Supreme Court, U.S.
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Case Number _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

KEN BREWER,

Petitioner

vs

CLARKE COUNTY SCHOOL DISTRICT,
HANS J. SCHACHT, and CHRIS GOOD
in their individual capacities,

Respondents

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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TABLE OF CONTENTS

Table of Authorities.....ii

Order of Eleventh Circuit

dated Jan. 4, 1995.....A-1

Order of U.S. District Court

dated March 10, 1993.....B-1

Order of U.S. District Court

dated July 15, 1993.....C-1

TABLE OF AUTHORITIES

Alicea Rosado v. Garcia Santiago,
562 F.2d 114, 119 (1st Cir. 1977).....B-49

Anderson v Indiana High School Athletic
Ass'n, 699 F.Supp. 710 (S.D.Ind.1988).....B-54

Arango v Guzman Travel Advisors Corp.,
621 F.2d 1371, (5th Cir. 1980).....B-33

Arp v Breman City Bd. of Educ. No. 1985-16
(State Bd. of Educ., Sept. 12, 1985).....B-43

Atascadera State Hosp. v Scanlon, 473 U.S. 234,
105 S.Ct. 3142, 87 L.Ed.2d 171 (1984).....B-27

Barker v Norman, 651 F.2d 1107
(5th Cir. 1981).....A-21, C-11

Bishop v Wood, 426 U.S. 341, 96 SD.Ct. 2074,
48 L.Ed.2d 684 (1976).....B-2, C-2

Blackston v. Shook & Fletcher Insulation Co.,
764 F.2d 1480 (11th Cir. 1985).....B-59

Blum v Yaretsky, 457 U.S. 991, 102 S.Ct. 2777,
73 L.Ed.2d 534 (1982).....B-53

Board of Regents v Roth, 408 U.S. 564, 92 S.Ct.
2701, 33 L.Ed.2d 548 (1972).....B-38,39

Bonner v Fulton County Bd. Educ., Case No. 1989-24 (State Board of Ed., Dec. 14, 1989).....B-43

Brewer v Purvis, etal 816 F.Supp. 1560 (MD Ga 1993).....A-2,4,19; C-2

Buxton v Plant City, Florida, 871 F.2d 1037, (11th Cir. 1989).....A-2,9,11,15,23; B-57,66,67; C-14,15

Campbell v Pierce County, 741 F.2d 1342 (11th Cir. 1984) *cert denied,* 470 U.S. 1052, 105 S.Ct. 1754, 84 L.Ed.2d 818 (1985).....B-61,67,68

Celotex v. Catrett, 477 U.S. 317, 106 S.Ct. 2538, 91 L. Ed.2d 265 (1986).....B-2,73

Childress v. Small Business Administration., 825 F.2d 1550, 1553 (11th Cir. 1987).....C-13

Chiodo v Bd. of Educ., 215 N.W.2d 806 (Minn. 1974).....B-44

Clark v Arizona Interscholastic Ass'n, 695 F.2d 1126 (9th Cir. 1982), *cert. denied,* 464 U.S. 818, 104 S.Ct. 79, 78 L.Ed. 2d 90 (1983)...B-55

Cleveland Bd. of Ed., 470 U.S. 532, S. Ct., L.Ed. (1982).....B-40

Codd v Velger, 429 U.S. 624, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977).....A-12,14,15; B-60

Copeland v Clarke County Bd. Educ., Case No. 1988-43, *aff'd.* J. Gaines, Civil Action No. SU-89-CV-0185 (Superior Court, Western Judicial Circuit, July 13, 1989).....B-43

Curtis v Bd. of Regents, 262 Ga 226, 416 S.E.2d 510 (1992).....B-28

Danno v Peterson, 421 F.Supp. 950 (N.D.Ill. 1976).....B-63,64

Davis v Scherer, 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984).....C-13

Diehl v. Albany County Sch., 694 F. Supp. 1534, (D. Wyo. 1988).....B-63,65

Downey v Southern Natural Gas Co., 649 F.2d 302, (5th Cir. 1981).....B-46,49

Early v Champion Int'l Corp., 907 F.2d 1077 (11th Cir. 1990).....B-72

Edelman v Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).....B-25

Ellis-Adams v. Whitfield County Bd. of Educ., 182 Ga. App. 463, 356 S.E.2d 219 (1987)....B-41

Emory v Peeler, 756 F.2d 1547
(11th Cir. 1985).....B-60
Employees of Dept. of Public Health and Welfare, Missouri v. Dept. of Public Health and Welfare, Missouri, 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973).....B-26
Endicott v Huddleston, 644 F.2d 1208 (7th Cir. 1980).....B-68,69
Florida v. Treasure Salvors, Inc., 458 U.S. 670, 102 S.Ct. 3304, 73 L.Ed.2d 1057 (1982).....B-36
Fouche v Jekyll Island-State Park Authority, 713 F.2d 1518 (11th Cir. 1983).....B-27
Freeman v Hinson, No. C76-1351
(N.D. Ga. 1977).....B-43
Garner v Wal-Mart Stores, Inc., 807 F.2d 1536, (11th Cir. 1987).....B-46
Gertz v Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed. 2d 789 (1974).....B-76
Goffer v Marbury 956 F.2d 1045
(11th Cir. 1992).....A-12,13,14,15
Goss v Exxon Office Systems, Co,, 747 F.2d 885 (3rd Cir. 1984).....B-50

Hafer v Melo, ___ U.S. ___, ___, ___, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991).....B-30

Hatcher v Bd. of Public Ed., 809 F.2d 1546 (11th Cir. 1987).....B-40

Henry v Metropolitan Sewer Dist., 922 F.2d 332 (6th Cir. 1990).....B-34,35

Hobbs v Georgia Dept. of Transp., 785 F.Supp. 980 (N.D.Ga. 1991).....B-32

Holley v Seminole County Sch. Dist., 755 F.2d 1492 (11th Cir. 1985).....B-42

Jett v Dallas Indep. Sch. Dist., 798 F.2d 748 (5th Cir. 1986), *modified on other grounds*, 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989).....A-44,46,47

Junior [v. Texaco, Inc.,] 688 F.2d 377 (5th Cir. 1982).....B-48

Jurgens v E.E.O.C., 903 F.2d 386 (5th Cir. 1990).....B-46

Karpovs v State of Mississippi, 663 F.2d 640 (5th Cir. 1981).....B-28

Kentucky v Graham, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed. 114 (1985).....B-31

King v Board of Education of City of Buford, 214 Ga App 325 (1994).....A-17,18,19

Kitchens v State, 198 Ga. App. 284, 401 S.E.2d 552 (1991).....A-17,18,19

Lagos v Modesto City Schools Dist., 843 F.2d 347 (9th Cir. 1988) *cert. denied*, 488 U.S. 926, 109 S.Ct. 309, 102 L.Ed.2d 328.....B-44,70

Lassiter v Alabama A & M University, 28 F.3d 1146 (11th Cir. 1994) (en banc).....A-21

Levendos v Stern Entertainment, Inc., 860 F.2d 1227 (3d Cir. 1988).....B-50,51

Libby v. South Inter-Conference Ass'n. 728 F. Supp. 504 (N.D.Ill. 1990).....B-55

Louisiana High School Athletic Ass'n v. St. Augustine High School, 396 F.2d 224 (5th Cir. 1968).....B-55,56

Ludgren v McDaniel, 814 F.2d 274 (1978)..B-30,37

Luger v Edmondson Oil, 457 U.S. 922, 102 S. Ct. 2744, 73 L.Ed.2d 482 (1982).....B-52

Mathews v Eldridge, 424 U.S. 319, 96 S.Ct. 832, 47 L.Ed.2d 18 (1976).....B-67

Maupin v. Indep. Sch. Dist., 632 P.2d 396 (Okla. 1981).....B-44

Mayer v Brown & Root Constr. Co., 661 F.2d 369 (5th Cir. 1981).....B-51

McKay v Boyd Const. Co. Inc., 769 F.2d 1084, (5th Cir. 1985).....B-33,34,35

Melton v Oklahoma, 928 F.2d 920 (10th Cir.) (en banc), *cert denied*, ___ U.S. ___, 112 S.Ct. 296, 166 L.Ed.2d 241 (1991).....A-14,15,16

Milkovich v Loraine Journal Co., 497 U.S. 1, ___, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990)...B-76

Mitchell v Louisiana High School Athletic Ass'n., 616 F.2d 152, *reh'g denied*, 621 F.2d 440 (5th Cir. 1980), *and cert denied*, 449 U.S. 1124, 101 S.Ct. 939, 67 L.Ed.2d 109 (1981).....B-53,56

Moore v Otero 557 F.2d 435 (5th Cir. 1977)..A-20

National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 109 S.Ct. 454, 102 L.Ed.2d 469 (1988).....B-54

Newton v Southeast Alabama Gas Dist., 708 F.Supp. 1254 (M.D. Ala. 1989).....B-52

Oklahoma City v Tuttle, 471 U.S. 808, 106 S. Ct. 16, 85 L.Ed.2d 695 (1985).....B-23

Owens Equip. & Erection Co. v Kroger, 437 U.S. 365, 98 S.Ct. 2396, 57 L.Ed. 2d 274 (1978)..B-29

Paul v Davis 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976).....B-60

Pennhurst State School & Hosp. v Halderman, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1983).....B-25,30,35

Post v City of Fort Lauderdale, 7 F.3d 1552, (11th Cir. 1993), modified, 14 F.3d 583 (11th Cir. 1994).....A-21

Quern v Jordan, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed. 358 (1979).....B-25

Randall-Baker v. Kohn., 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982).....B-52,53

Rich v Dollar, 841 F.2d 1558 (11th Cir. 1988).....A-21

Roberts v College of the Desert, 870 F.2d 1411, (9th Cir. 1988).....B-35,36

Robinson v Georgia Dept. of Transp., 966 F.2d 637 (11th Cir. 1992).....B-25

Rockdale County School Dist. v. Weil, 245 Ga 730, 266 S.E.2d 919 (1980).....B-41

S & W Seafoods Co. v Jacor Broadcasting of Atlanta, 194 Ga App 233, 390 S.E.2d 228 (1989).....B-75

Schopler v. Bliss, 903 F.2d 1373.....B-25

Schneeweis v Jacobs, 771 F.2d 733 (E.D.Va. 1991).....B-62,63

Shawgo v Spradlin, 701 F.2d 470 (5th Cir. 1983).....B-46

Shelley v. Kraemer, 334 U.S. 1, 68 S. Ct. 836, 92 L.Ed. 1161 (1948).....B-52

Simmons v State of Cal. Dept. of Indus. Rel., 740 F.Supp. 781 (E.D.Cal. 1990).....B-34

Slockett v. Iowa Valley Community Sch. Dist., 359 N.W.2d 446 (Iowa, 1984).....B-44

Smith v Bd. of Educ. of Urbana Sch. Dist. No. 116, 708 F.2d 258 (7th Cir. 1983).....B-62,63

Stang v Indep. Sch. Dist., 256 N.W.2d 82 (Minn. 1977).....B-44

Stephens v. C.I.T. Group/Equip. Financing, Inc., 955 F.2d 1023 (5th Cir. 1992).....B-50

Tate v Government Employees Insurance Co. 997 F.2d 1433 (11th Cir. 1993).....A-8

Tate v. Livingston Parish Sch. Dist. U-46 v. Kossoff, 419 N.E.2d 658 (Ill. App. 1981)....B-44

Wells v Doland 711 F.2d 670 (5th Cir, 1983).A-9

West v Atkins, 487 U.S. 42, 108 S.Ct. 2250 2255, 101 L.Ed.2d 40 (1988).....B-24

Western Union Tel. Co. v Vickers, 71 Ga. App. 204, 30 S.E.2d 440 (1944).....B-75

White v. Banks, 614 S.W.2d 331 (Tenn. 1981).B-44

Wiggins v Citizens & Southern Nat. Bank, 173 Ga. App. 761, 328 S.E. 222 (1985).....B-72,74

Will v Michigan Dept. of Police, 491 U.S. 58, 109 S. Ct. 2304, 105 L.Ed 45 (1989).....B-32

Williams v City of Albany, 936 F.2d 1256 (11th Cir. 1991) (per curium).....C-10

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 93-9446

D.C. Docket No. CA 91-39-ATH(DF)

FILED JAN. 4, 1995

Appeal from the United States District Court

for the Middle District of Georgia

Appellant Ken Brewer ("Brewer") appeals the district court's grant of appellees' motion for judgment as a matter of law in this 42 U.S.C. § 1983 action. Brewer alleges that the Clarke County School District ("CCSD") deprived him of his constitutionally protected liberty interest without due process of law in connection with his termination as head football coach at Cedar Shoals High School ("Cedar Shoals"). The district court granted judgment as a matter of law on the ground that Brewer failed to present

legally sufficient evidence of publication by the government employer. *See Buxton v Plant City, Florida*, 871 F.2d 1037 (11th Cir. 1989). Upon an independent review of the record, we see no error in the district court's findings and, accordingly, affirm the judgment of the district court.

I. BACKGROUND[1]

The CCSD employed Brewer as a teacher and Head Football coach at Cedar Shoals from the spring of 1986 until April of 1990. On April 12, 1989, Brewer signed a contract of employment as a ,ember of the cedar Shoals teaching staff for the scholastic year 1989-10990, which paid a $27,167.00 annual salary. On july 20, 1989, the Personnel director of CCSD issued a personal information indicating that Brewer would receive a salary supplement of $7,400.00 for his

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[1] The facts are recited in more detail in the district court's opinion. *See Brewer v Purvis*, 816 F.Supp. 1560 (M.D. Ga. 1993).

football coaching position during the 1989-1990 season.

The CCSD has a "no pass/no play" rule which comports with the Georgia High School Association's ("GHSA") academic eligibility rules. These rules require that a student in his third year of high school must have passed and received credit for ten units before he is eligible to participate in interscholastic competitions. One student at Cedar Shoals, J.C. did not have the passing grades necessary to play football for Cedar Shoals. After J.C.'s father discussed J.C.'s eligibility with Coach Osborne, who taught handicapped students at Cedar Shoals, Coach Osborne tested J.C. and surmised that he might have a learning disability. Coach Osborne informed some of J.C.'s teachers about his learning disability, and eventually four of J.C.'s grades were changed. Then J.C. was declared eligible for the 1989 football season.

In the early fall of 1989, the State Dept.

of Education notified GHSA of a possible violation of eligibility rules by Cedar Shoals. The GHSA held a hearing on November 9, 1989, on the allegations of breach of GHSA's regulations by Cedar Shoals. Following the hearing, the GHSA made findings and assessed penalties against Cedar Shoals.[2] The GHSA forwarded its ruling to Dr. Carol Purvis ("Dr. Purvis"), Superintendent of the CCSD.

Chris Good ("Good"), an investigator for the Professional Practices Commission ("PPC")[3], along with administrators of the "no pass/no play rule," began an investigation involving one

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[2] For a detailed list of findings and ruling, see *Brewer v Purvis*, 816 F.Supp. at 1566.

[3] The PPC is an agency of the State of Georgia authorized to investigate alleged violations of rules, regulations, or policies of the state board, the commission, or a local board, by an educator. *See O.C.G.A.§20-2-796(a)(1)-(4)*

or more interviews with approximately twenty-five people. On November 14, 1989, Mr. Hans Schacht ("Schacht"), Executive Director of the PPC, and Good informed Dr. Purvis of the PPC investigation. Schacht informed Dr. Purvis that the local school board should not investigate the matter since the CCSD had an internal task force investigating the situation. On January 23, 1990, Schacht advised Dr. Purvis of the PPC Executive Committee's finding that probable cause existed to believe that Brewer had committed an act or acts warranting the suspension of his teaching certificate.[4] On February 1, 1990, Schacht presented the PPC's investigative report to the CCSD in an open meeting attended by the media.

On February 6, 1990, the CCSD internal task force presented its written report to the CCSD in an open meeting. this report found that the grade-changing/grade correction practices at

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[4]Brewer's teaching certificate, however, was never suspended.

Cedar Shoals were deficient. Based on the GHSA's ruling, the PPC investigation, and the CCSD's internal task force report, Dr. Purvis decided to recommend that Brewer be relieved of his duties as head football coach. Two days later, the Clarke County Board of Education ("the board") voted to relieve Brewer of his coaching responsibilities at Cedar Shoals. Brewer still maintained his teaching position; however, he was absent from teaching twenty-nine times from February 9 until March 23, 1990. Brewer requested a leave of absence but the board unanimously voted to deny the request. Dr. Purvis spoke with Brewer and informed him that he could either return to work, in which case he would not be fired, not return to work and be fired, or he could submit his resignation. On March 26, 1990, Brewer submitted his resignation effective April 2, 1990.

Brewer subsequently filed this 42 U.S.C. § 1983 action alleging that the CCSD deprived him of his constitutionally protected liberty

interest without due process of law when it fired him from his football coaching position at Cedar Shoals. The district court conducted a bench trial and at the conclusion, entered judgment as a matter of law, pursuant to Fed.R.Civ.P. 50 on the ground that Brewer failed to prove a necessary element of a liberty interest deprivation claim. Brewer then perfected this appeal.

II. ISSUES

1. Whether the district court erred in granting the motion for judgment as a matter of law.

2. Whether the district court erred in granting Schacht and Good's motion for summary judgment on the basis of qualified immunity.

3. Whether the district court erred in not admitting into evidence newspaper articles which recounted the grade changing controversy.

III. Discussion

A. *Motion for judgment as a matter of law*

Brewer contends that the district court

erred in granting the CCSD's motion for judgment as a matter of law on the basis that Brewer failed to prove a necessary element of a liberty deprivation claim. In reviewing the grant of a judgment as a matter of law, this court must "evaluat[e] all of the evidence, together with logical inferences, in the light most favorable to the party opposing the motion." *Tate v Government Employees Insurance Co.* 997 F.2d 1433, 1436 (11th Cir. 1993).

Brewer claims that CCSD deprived him of his liberty interest without due process of law when it received a copy of the PPC report in a meeting open to the public, subsequently relieved him of his coaching duties, and did not afford him an opportunity to clear his name. In order to prove a deprivation of a public employee's liberty interest without due process of law, a plaintiff must prove: (1) a false statement (2) of a stigmatizing nature, (3) attending a governmental employee's discharge (4) made public, (5) by the governmental

employer, (6) without a meaningful opportunity for the employee to clear his name. *Buxton v Plant City, Florida* 871 F.2d at 1042-43. The plaintiff bears the burden of establishing each and every element of his liberty interest claim. *Wel[illegible] Doland* 711 F.2d 670, 677 (5th Cir, 1983). The district court found that Brewer failed to satisfy the elements of public disclosure by the governmental employer and therefore granted CCSD's motion for judgment as a matter of law.

The district court correctly determined that Brewer failed to meet the "made public by a governmental employer" requirement enunciated in *Buxton*. Under the Georgia Open Records Act, O.C.G.A. § 50-18-70, state, county, and municipal records are open to inspection by the general public, except where specifically exempt by state law. "Public records" as contemplated by the Open Record Act include "all documents, papers, letters, maps, books, tapes, photographs, or similar material prepared and

maintained or received in the course of the operation of a public office or agency." *Id* at § 50-18-70 (a). Specifically, with regard to "records consisting of materials obtained in ... investigation of complaints against public.. employees," public disclosure is not required until "[1] ten days after the same has been [resented to the agency or an officer for action or [2] the investigation is otherwise concluded or terminated..." *Id.* at § 50-18-72 (1)(5). PPC investigations are authorized by Georgia law, *See generally* O.C.G.A. § 20-2-790 *et seq.*, and state regulations require a PPC investigation to culminate in a written report to be submitted to the Executive Director for probable cause determination. *Id.* The files and documents of the PPC are subject to the Open Records Act. *Id.*

The PPC investigative file and memorandum regarding Brewer was prepared and maintained in the course of the operation of the PPC. *See* R7-127-32. The PPC investigation concluded no later than January 12, 1990, when the PPC investigator

signed the memorandum setting forth the results of his investigation. At that time, the memorandum became a public record as a matter of law and the PPC considered and treated it as such. R7-132-33 139,142-43,210-212. Accordingly, the allegedly stigmatizing material became public as a matter of law, *see* O.C.G.A. § 50-18-70; O.C.G.A § 50-18-72, and was published for purposes of due process *before* the CCSD obtained copies of then PPC report on February 1, 1990. *See Buxton* 871 F.2d at 1045 (when documents become public pursuant to state law, then, for due process purposes, publication of the information contained in those documents must be held to occur at the time of filing).

Furthermore, information regarding the investigation, including a copy of the PPC report and a press release regarding the Executive Committee's action, was *made public* as a matter of law *by the PPC* on January 26, 1990, when it furnished a copy of the press release to Channel 5 television in Atlanta. R7-157-160;

Def.'s Exhs. 7, 8, & 9 (emphasis added). The PPC also furnished a copy of its report to Deedra Brewer, a member of the public, before the CCSD received a copy. R7-157-158; Def's Exhs. 6 & 7. Thus, in receiving copies of the PPC report on February 1, 1990, the CCSD was merely obtaining a copy of a public document created by the PPC. In *Codd v Velger* 429 U.S. 624, 628 (1977), the Supreme Court stated that only if the government employer "creates and disseminates" a false and defamatory impression about an employee in connection with his termination is a name clearing hearing required. Based upon the evidence presented to the district court in the present case, the CCSd did not "create" nor "disseminate" this allegedly stigmatizing information.

In *Goffer v Marbury* 956 F.2d 1045 (11th Cir. 1992), we focused on this "create and disseminate" requirement. In *Goffer*, a staff member of a public, state supported university was terminated from employment. *Id. at* 1048. The

executive vice-president of the university filled out an exit termination form in which he stated that Goffer was "'manifestly untruthful, untrustworthy, unethical, subversive and demonstrative of poor judgment.'" *Id at* 1052. He placed the form in Goffer's personnel file and alter read the above language to a city employee who called seeking information about Goffer as a possible job applicant. *Id.* Goffer did not receive a name clearing hearing. *Id.* At trial, the defendants moved for directed verdicts with respect to the stigmatizing claims and the district court denied the motions. On appeal we concluded that the stigmatizing references to Goffer were published by the vice-president's placing the exit form in her file; we concluded further that the stigmatizing material was also published by the vice-president's repeating that information to the city employee. *Id.* With regard to the university president, we noted that there was no evidence that he participates in or countenances the creation of the exit

form. *Id.* Furthermore, although after Goffer's termination, the university president told a third party that Goffer had been fired, there was no evidence that he provided that third party with the particulars nor that he shared the contents of the exit interview form with that third party; that is, the university president did not *disseminate* the stigmatizing information. *Id.* (emphasis added). The same principal applies here. There is no evidence that the CCSD participated in or countenanced the creation of the allegedly stigmatizing information.

Absence of either one of the elements of the "create and disseminate" requirement is sufficient to preclude Brewer's recovery on his liberty interest claim, for that requirement is a conjunctive one. *See Codd*, 429 U.S. at 628; *Melton v Oklahoma*, 928 F.2d 920, 928 & n. 12, 931 (10th Cir.) (en banc), *cert denied*, ___ U.S. ___, 112 S.Ct. 296, 166 L.Ed.2d 241 (1991). In *Melton*, a police officer had been accused of

perjury by the FBI and was the subject of a police department internal affairs investigation. *Melton* 928 F.2d at 922. Upon inquiry, a departmental public affairs officer repeated that information to a reporter; however, unnamed sources other than the public affairs officer previously made public disclosure of such information. *Id.* at 923-24. The accused officer was later discharges and he filed a claim for deprivation of his liberty interest. *Id. at* 924-25. The court noted that the defendant, the public affairs officer, did not "create" a false and defamatory impression because the disclosure of information regarding the perjury charge did not originate with the defendant. *Id.* at 928-30. Accordingly, the conjunctive requirement of *Codd* was not satisfied. *Id.* at 928 & n.12.

The approach in *Melton*, is consistent with this court's acknowledgment of the "create and disseminate" requirement in *Buxton v Plant City*, 871 F.2d 1037 (11th Cir. 1989), and *Goffer v*

Marbury, 956 F.2d 1045 (11th Cir. 1989), As in *Melton*, "[i]t is impossible, in this case, to say the employer created the false and defamatory impression when the original disclosure came from another source. 928 F.2d at 928 & n.12. In the instant case, the original disclosure,a s a matter of law and as a matter of fact, came form the PPC. Thus, even if the substantive contents of the allegedly stigmatizing PPC report were revealed at the board meeting on Feb. 1, 1990, the CCSD did not *create* the stigmatizing information, which for due process had been previously been made public by the PPC.

We note that the National Education Association ("NEA") filing a brief as *amicus curiae*, contends that the issue before the court is one of first impression and asks whether a public employee may prove his liberty interest was violates simply by showing that he was fired at a time of such public controversy that his superiors should have known he would be

stigmatized, even thought the employer did not explicitly state that the employee was fired for stigmatizing reasons. therefore, the NEA claims that it does not matter whether the PPC was the original source of the charges and publicized them before the CCSD did or whether the CCSD did not "formally" or "explicitly" adopt the PPC charges by passing a resolution firing Brewer for his role in the grade changing scandal because CCSD's timing of its action communicated to the public, the media, and potential employers that Brewer was guilty as charged. As a result, the CCSD allegedly imposed on Brewer a stigma that foreclosed any future employment opportunities in his chosen profession -- coaching football.

The CCSD contends that Brewer's coaching position was supplemental and as such, does not warrant constitutional protection. A recent Georgia case, *King v Board of Education of City of Buford*, 214 Ga App 325 (1994), supports the CCSD's position. In *King*, the plaintiff had a

teaching contract with the school district and had also been assigned the supplemental duties of band director. *Id.* at 325-26. The school board eventually decided not to continue the plaintiff as band director but offered her continued employment as a classroom teacher. *Id.* The plaintiff contended that the board's decision to discontinue her in the position of band director was a "demotion" which entitled her to the procedural protection of Georgia's Fair Dismissal Law, O.C.G.A. § 20-2-940 *Id.* Under the statute, a demotion occurs when a teacher or other school employee is effectively moved "from one position in the school system to another position in the school system having less responsibility, prestige, and salary. *Id.* at 326-27. The evidence showed that the plaintiff would lose her supplemental salary, have fewer responsibilities, and would suffer a loss of prestige. *Id.* at 327. The Georgia Court of Appeals held, however, that the plaintiff's loss of band director duties did not amount to

a demotion. *Id.* at 326. The court acknowledged the plaintiff's lost responsibilities, reduced salary, and diminished duties, and further acknowledged that "classroom teachers who are also band directors place a significantly higher value on that status than they do on their underlying status as classroom teachers generally." *Id.* at 327. the court concluded that the plaintiff's band director duties were not a "distinct position" and her loss of these duties did not amount to a demotion.[5]

As in *King*, Brewer's supplemental duties as a coach did not constitute a distinct position under Georgia Law. There was no written contract for Brewer's supplemental coaching job. *See Brewer v Purvis* 816 F.Supp at 1572. Brewer had a written contract to teach, not coach. The

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[5] The court noted that the Buford School System's addendum listed twenty-five other potential extra duty assignments other than band director. Listed among these was head football coach. *Id.* at 328 n.2.

supplemental pay received for his coaching duties was not included in the teaching contract. *Id.* Also, tenure is not required in a coaching position, as it is in some teaching positions. *Id.* The CCSD enters into contracts with teachers, not coaches. Additionally, high school football, although extremely important to many people, is an extracurricular activity. Brewer retained his employment as a teacher until his resignation. Brewer lost his supplemental position as a coach, but this loss does not amount to a demotion under Georgia law and does not invoke the due process protection of the Fourteenth Amendment. *See Moore v Otero* 557 F.2d 435 (5th Cir. 1977).

In sum, we affirm the district court's grant of CCSD's motion for judgment as a matter of law.

B. *Qualified Immunity*

The district court correctly ruled that Schacht and Good were entitled to summary judgment based on qualified immunity because

Brewer failed to show that Schacht and Good violated clearly established law. "For the law to be clearly established to the point that qualified immunity does not apply, the law must have earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendants place, that 'what he was doing' violated federal law." *Lassiter v Alabama A & M University*, 28 F.3d 1146, 1149 (11th Cir. 1994) (en banc). "If case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant." *Post v City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993), modified, 14 F.3d 583 (11th Cir. 1994).

In reviewing Brewer's claim, it is clear that Schacht and Good were acting within their discretionary authority when the alleged violations occurred. *See Rich v Dollar*, 841 F.2d 1558, 1564 (11th Cir. 1988), *quoting Barker v Norman*, 651 F.2d 1107, 1121 (5th Cir. 1981) (a

government official proves that he acted within the purview of his discretionary authority by showing "objective circumstances that would compel the conclusion that his actions were undertaken pursuant to the performance of his duties and within the scope of his authority"). Brewer cannot dispute that Schacht and Good were acting in their discretionary authority as an Investigator and Executive Director of the PPC, respectively, when the alleged violations took place. All actions alleged by Brewer occurred during the PPC's investigation of Cedar Shoals and were within the lawful authority of Schacht and Good. the PPC is authorized under O.C.G.A. § 20-2-796 to conduct investigations regarding certified school personnel for the purpose of making recommendations to the State Board of Education, the local board, the Professional Standards Commission, or any combination thereof, which may accept or reject such recommendations.

Moreover, Brewer fails to establish that

either Good or Schacht violated any clearly established law. Brewer claims that Good violated his liberty interest and his right to due process by not giving written notice to the local board of education prior to beginning the PPC investigation and testifying in a Georgia High School Association hearing regarding his preliminary findings. Brewer fails to show, however, exactly what clearly established constitutional rights were violated by Good's failure to give written notice to the school board prior to the investigation. regarding Schacht, Brewer claims Schacht violated his constitutional rights to liberty and due process by presenting the PPC's investigative report and recommendation to suspend Brewer's teaching certificate for two years to the school board in a public meeting. Brewer fails to prove that Schacht deprived him of any constitutional right since Schacht was not Brewer's employer. *See Buxton*, 871 F.2d at 1042. Accordingly, the district court properly granted summary judgment

to Schacht and Good on the basis of qualified immunity.

C. *Evidentiary Ruling*

Brewer contends that the district court improperly held that newspaper articles which evidenced the grade-changing incident at Cedar Shoals were admissible. These articles reflected the media attention which attended the grade changing incident. Brewer attempted to present these articles to show the stigmatization which occurred and the extent of the controversy. this argument provided no basis for reversal of the district court's judgment. The district court did not grant judgment as a matter of law on the basis of Brewer's failure to prove the stigmatizing nature of the statement at issue and the articles were presented to prove stigmatization only. Accordingly, we see no abuse of discretion in the exclusion of these articles from evidence.

IV. Conclusion

For the Forgoing reasons, we arfirm the Judgement of the District Court.

Affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

KEN BREWER,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	CIV. NO.91-39-ATH(DF)
	:	
CAROL PURVIS, CLARKE CO. SCHOOL DISTRICT, WILLIAM C. FORDHAM, GEORGIA HIGH SCHOOL ASSOCIATION, HANS J. SCHACHT, CHRIS GOOD, THE PROFESSIONAL PRACTICES COMMISSION,	:	
	:	
Defendants.	:	

FITZPATRICK, District Judge

Defendants' motions for summary judgment are presently pending in this court. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.R. 56(c). For purposes of a summary judgment motion, the non-movant's version of the facts must be accepted and all disputed matters must be resolved in favor of

the non-movant. *Bishop v Wood,* 426 U.S. 341, 96 SD.Ct. 2074, 48 L.Ed.2d 684 (1976). Summary judgment, however is mandated, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial. *Celotex v. Catrett,* 477 U.S. 317, 106 S.Ct. 2538, 91 L. Ed.2d 265 (1986).

BACKGROUND

Plaintiff Ken Brewer was employed by the Clarke County School District ("CCSD") as the head football coach and as a teacher at Cedar Shoals High School ("CSHS") from the spring of 1986 until April of 1990.[1] On April 12, 1989, Plaintiff signed a contract of employment as a member of the CSHS teaching staff for the scholastic year 1989-90, which called for a $27,167.00 annual salary. On July 20, 1989, the Personnel Director issued a personnel information indicating that Brewer would receive

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[1] Purvis deposition, p.98

a salary supplement of $7,400.00 for serving as the head football coach during the 1989-1990 season.[2]

CSHS is a member of the Georgia High School Association ("GHSA"). The GHSA is a voluntary association of 355 public and private high schools organized to promulgate and enforce uniform rules of eligibility and play between its members.[3] Schools are required to determine and certify eligibility rules for competing students to the GHSA. One of the academic eligibility requirement that a student be "on track" for graduation before he/she can participate in athletics. The "on track" provision was enacted by the State Board of Educaticn in July of 1987, effective for then 1987-88 school year and was adopted in

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[2] Affidavit of Herbert Stroud ("Stroud Affidavit") in Support of CCSD's Motion for Summary Judgment, Exb. B.

[3] Affidavit William C. Fordham, P. 1.

October 1988 by the GHSA Executive Committee[4], which included CSHS's athletic director.[5] In order to be "on track" a student in his third year of high school must have passed and received credit for ten (10) units before he is eligible to participate in interscholastic competitions.[6] The Clarke County School District's "no pass/no play" rule is identical to the GHSA's rule.[7]

Football practice began on August 1, 1989. Coach Glen Townsend, who was responsible for determining student eligibility, prepared a list of all players desiring to participate in varsity football and checked the school records to determine whether those students were eligible. J.C.'s grades at CSHS were as follows:

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[4]GHSA By-Law § 1.55

[5]Second Fordham Affidavit at P. 3.

[6]Fordham Affidavit at P 3.

[7]Stroud Affidavit in Support of CCSD's Motion for Summary Judgment,Exh. D

1987-1988 School Year

English I	48/F
Math I	62/F
Physical Science	high 60s/F
World Geography	mid 50s/F
Art	77/C
Health and PE	77/C

1988-1989 School Year

Math I	52/F
Math II	72/C
Biology	58/F
World History	77/C
Building and Construction Technology I	F
P.E.	85/B

Summer 1989

Biology	77/C
General Math	75/C

Since J.C. had passed only seven subjects during his first two years of high school, he was ineligible to play varsity football, and he did not participate in football practice on

August 1, 1989. [8] Coach Townsend told Coach Brewer that J.C. was ineligible.

The week before football practice began, J.C.'s father visited Charles Worthy, Associate Principal at CSHS. J.C.'s father indicated his desire to have J.C. play football and his concern that J.C. might not remain in school if he were not permitted to play football that year. J.C.' father had previously talked to Coach John Osborne, who taught handicapped students at CSHS, about J.C.'s academic problems.[9] Coach Osborne surmised that J.C. might have a learning disability and arranged for J.C. to be tested. Coach Brewer called the GHSA and asked if J.C.'s placement in special education would automatically make him

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[8] Stroud Affidavit. Exh. D.

[9] Professional Practices Commission ("PPC") Hearing, Testimony of John Osborne at 362.

eligible.[10] Mr. Fordham informed Mr. Brewer that special education placement had no effect on eligibility.[11]

Coach Osborne contacted Mr. David Schwartz and asked if he would test J.C. After Mr. Schwartz agreed to do so, Mr. Osborne called J.C.'s father and gave him Mr. Schwartz's name. J.C.'s father then contacted Mr. Schwartz and made an appointment for J.C. for Saturday, August 26, 1989.[12] That evening, Mr. Schwartz informed Coach Osborne that J.C. had a learning disability.[13] Coach Osborne then advised some

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[10] PPC hearing, Testimony Ken Brewer, p. 886.

[11] Id.

[12] Id. Testimony John Osborne at 366-369.

[13] Mr. Schwartz's evaluation said that J.C. had a reading disability. PPC hearing, Testimony of Nancy Congor, p. 609. J.C. was eventually rejected for special education placement. Id. at 615.

of J.C.'s teachers about the test results. Eventually four of J.C.'s grades were changed. [14] J.C. was declared eligible for football on August 30, 1989, and practiced football that day.

In the early fall of 1989, GHSA was notified by the State Department of Education of a possible violation of eligibility rules by CSHS, i.e. that the grades of a Cedar Shoals student athlete, J.C., had been changed to make

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[14] J.C.'s grades in Math, Physical Science, World Geography, and Construction were changed. See PPC hearing at 259-260, 305, 482-483, 509. There is a lack of consensus among the various defendants as to how many of these changes were improper. *See* Exh. C to GHSA's motion for summary judgment (three); Response of Carol Purvis to plaintiff's Requests for Admissions (two); PPC Investigative Report (four).

the student eligible to play football. [15] On November 1, 1989, Chris Good, an investigator for the Professional Practices Commission[16] ("PPC"), received a telephone call from Mr. Randall Ponder, who was the administrator in charge of no pass/no participate. Mr. Ponder informed Mr. Good that he had received a report of violations of the No Pass/No Participate rule at CSHS and that he and regional Director Jim Gurley were going to Cedar Shoals on November 7, 1989, to begin an investigation. Mr. Ponder

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[15] Nancy Congor, who is in charge of special education referrals at CSHS, testified that she made an anonymous phone call at the end of October 1989. PPC hearing at 634, 646.

[16] The PPC is an agency of the State of Georgia authorized to investigate alleged violations of rules, regulations, or policies of the state board, the commission or a local board by an educator. O.C.G.A. § 20-2-796 (a)(1)-(4).

asked Mr. Good to accompany them.

On November 7, 1989, Good, Gurley and Ponder visited CSHS.[17] While visiting CSHS, Chris Good spoke with Plaintiff for approximately five minutes.[18] On the same day, Gurley and Ponder visited Dr. Purvis and informed them of their investigation.[19] The next day Dr. Purvis met with Mr. Doug McLaughlin, the principal of CSHS, regarding the grade changing incident.

On November 8, 1989, Mr. Fordham called Mr. Good to inform him that GHSA would hold a hearing on Nov. 9, 1989 on the allegations of GHSA's regulations by CSHS. Mr. Fordham granted Mr. Good's request to attend as an observer for informational purposes. Although the PPC did not receive a written request to conduct an

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[17] PPC hearing, Testimony Chris Good, p. 694.

[18] Id. at 698.

[19] PPC hearing, Testimony Carol Purvis, p. 136.

investigation into the grade changing incident until Nov. 13, 1989[20], it instigated an official investigation on Nov. 9, 1989[21], which involved one or more interviews with approximately twenty-five people.[22]

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[20] PPC Hearing, Respondent's Exh. No. 6. The letter from Dr. Hall Rogers, Associate State Superintendent, though dated Nov. 8, 1989, is stamped "Received November 13, 1989." Chris Good testified that Mr. Ponder told him when they left CSHS on November 7, that he would receive a referral the next day. Id. at 855.

[21] Chris Good testified that he was conducting a "preliminary" investigation on behalf of the PPC at the invitation of the State Board of Education when he visited CSHS on November 7, 1989. PPC hearing at 852.

[22] Stroud Affidavit, Exh. "E". The first day "official" interviews were conducted at CSHS was Nov. 13, 1989.

On November 9, 1989, Coach Brewer observed Chris Good talking with Mr. Alan Connell, attorney for the GHSA, and William C. Fordham before the GHSA hearing began.[23] During the hearing Coach Brewer testified that he had no interest or knowledge of any grade changes involving J.C. Mr. Connell turned and asked Mr. Good if Coach Brewer had indicated the same in earlier interviews. Mr. Good replied that Coach Brewer told him that Coach Osborne had approached him and said "Here's the deal. I've talked to all the teachers. I think they understand. It wouldn't hurt for you to talk to them."

After the evidentiary hearing, William Fordham made the following fact findings and assessed the following penalties:

> In view of the fact that (1) only three courses were needed to gain eligibility and only three grades were changed; (2) two of

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[23] Affidavit of Ken Brewer, dated Aug. 14, 1992. P. 12.

the three teachers who changed grades were football coaches and all three acted after a request for review by Coach Osborne; (3) the action taken by Coach Osborne is not such action as he customarily took on behalf of all other students; (4) no one could recall a similar case where grades were changed after a two year period; (5) no make up work or supplemental work was performed by the student prior to the grade changes; (6) all three grades were changed within a two year period; (7) the student was, on the same day the grades were changed, immediately certified to the GHSA as eligible; and (8) Coach Osborne had a conversation with Coach Brewer indicating that eligibility for football was considered in the action taken by Coach Osborne, I must conclude that the actions taken by the Cedar Shoals personnel were for the purposes of improperly securing eligibility for the student to play

football. These actions are in violation of the GHSA Constitution Art. IV Section 14 and GHSA Bylaws Section 2.31b. Cedar Shoals is hereby required to:

(1) forfeit any games won during the 1989-90 school year in which the subject student participated;

(2) be on probation for one calendar year from the date of this ruling;

(3) pay a $1,000.00 fine.[24]

William Fordham forwarded his ruling to Dr. Carol Purvis, Superintendent of the Clarke County School District. Neither the GHSA nor any other person acting on its behalf released a copy of the decision to anyone other than Superintendent Purvis. GHSA did not announce its decision and all inquiries were directed to Superintendent Purvis.[25]

CSHS subsequently appealed the decision to the GHSA State Board of Appeals, which

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[24] Fordham Affidavit, Exh. C.

[25] Fordham Affidavit at P. 9.

unanimously upheld the Executive Director's decision.[26] CSHS did not exercise its right to appeal the decision to the full GHSA Executive Committee.[27] On November 13, 1989, a CCSD Internal Task Force was formed at the direction of the Clarke County School Board to investigate grade changing, eligibility requirements, including the no pass/no participate policy and the screening process for special education students in the CCSD. The CCSD Internal Task Force completed its investigation on December 15, 1989, and found that while things at the three middle schools and CCHS [sic] generally were in good shape, grade changing/grade correction at CCHS was not. Dr. Purvis received the Task Force's Report on January 5, 1990.[28]

On November 14, 1989, Mr. Hans J. Schacht, Executive Director of the PPC, and Mr. Good visited Dr. Purvis to inform him of the PPC

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[26] Fordham Affidavit at P. 10.

[27] Id.

[28] Affidavit of Dr. Purvis, P. 8.

investigation. During the meeting, Schacht advised Dr. Purvis that it would be "improper for Purvis or the Clarke County Board of Education to investigate the grade changing situation" since CCSD had a "legal arm of the state who was doing the investigating" and that any local investigation should be put on hold.[29]

On January 23, 1990, Mr. Schacht advised Dr. Purvis of the PPC Executive Committee's finding that probable cause existed to believe that Plaintiff had committed an act or acts warranting the suspension of his teaching certificate. On January 24, 1990, Dr. Purvis telephoned Mr. Chris Good and asked for clarification concerning the PPC Executive Committee's findings and recommendations.

On February 1, 1990, Mr. Schacht presented the PPC's investigative report to the CCSD in an

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[29] Purvis deposition, dated Jan. 17, 1991, pp. 26-27.

open meeting attended by the media.[30] In the report Mr. Schacht recommended that Coach Brewer's teaching certificate be suspended for two years. Schacht also instructed the Board to "use the report for study, deliberation, and to make decisions about employees and their contract tenure that are ethically and legally defensible."[31] Schacht was quoted in the local newspaper as telling the school board and public that the reason he gave the local school system the report was because they might not be able to enforce its no pass/no play policy since it was invalid.[32]

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[30] Purvis Affidavit at P. 11.

[31] Exh. D to Plaintiff's Opposition to PPC's motion for summary judgment.

[32] In *Kitchens v State*, 198 Ga App. 284, 401 S.E.2d 552 (1991), the Georgia Court of Appeals held that state school policy, including the no pass/no play rule was invalid because it had not been promulgated by the Administrative

On Feb. 6, 1990, the CCSD Internal Task Force presented its written report to the CCSD in an open meeting.[33] Based on the GHSA's ruling, the PPC investigation, and the CCSD's Internal Task Force Report, Dr. Purvis decided to recommend that plaintiff be relieved of his duties as head Football Coach.[34] On Feb. 8, 1990, the Clarke County Board of Education, without holding a hearing, voted to relieve Plaintiff of his responsibilities as Head Football Coach at Cedar Shoals to be effective immediately.[35] Neither Defendant Purvis nor the Clarke County School system investigated the allegations of improper grade changes before the decision was made to relieve Brewer of his coaching position.[36] Rather the incident was

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Procedure Act.

[33] Purvis Affidavit, P. 12.

[34] Purvis Affidavit, P.12.

[35] Stroud Affidavit, Exh. "H".

[36] PPC hearing, testimony Carol Purvis, pg. 142.

investigated many months later. [37]

Brewer was absent from work twenty nine times from Feb. 9 until March 23, 1990.[38] Many parents and school board members contacted Dr. Purvis about Mr. Brewer's absenteeism.[39] On March 15, 1990, Brewer suffering stress and public humiliation, requested a leave of absence from Superintendent Purvis through his attorney.[40] Purvis received a copy of the letter confirming his permission to take a leave of absence but did not respond to it.[41] On March 22, 1990, the Clarke County Board of Education unanimously voted to deny Brewer's request for a leave of absence.[42] The CCSD did

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[37] Id.

[38] Purvis Deposition, Exh. C.

[39] Purvis affidavit. P. 13.

[40] Affidavit Ken Brewer, dated Feb. 14, 1990.

[41] Deposition Carol Purvis, dated Aug. 30, 1991, p.94.

[42] Purvis deposition, p. 92-93.

not provide Brewer a pre-termination hearing.

On March 22, 1990, the CCSD discovered that in Sept. 1989, Dr. Tina Upchurch, Director of Special Education, had informed Elizabeth Ireland, the Associate Superintendent of Clarke County School District, about the changes in J.C.'s grades and that Dr. Ireland had not taken any action. Although Dr. Purvis learned that his office had been informed of the grade changes in September, 1989, he chose not to divulge this information to the School Board[43]. Both Dr. Ireland and Dr. Purvis subsequently received letters of reprimand.[44]

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[43] Exh. C to plaintiff's Brief in Support of Motion for Reconsideration of Plaintiff's Motion to Compel; Clarke County School District's Response to Plaintiff's First Interrogatories No. 17; PPC hearing, Testimony of James Harris, p. 338; Testimony of Elizabeth Ireland, at 802-806.

[44] Purvis affidavit, P.18.

On March 26, 1990 Brewer submitted a letter of resignation, effective April 2, 1990, to the CCSD after he received a phone call from Dr. Purvis informing him he could either return to work, in which case he would not be fired, not return to work and be fired or he could submit his resignation.[45]

Prior to September 1990, Don Farmer of WSB-TV in Atlanta, Georgia, interviewed William Fordham as part of a feature story on Georgia high school athletics. In the interview, which was aired in September of 1990, Fordham made the following statements:

> Farmer: Did [Brewer] foul up?
>
> Fordham: Yeah, he fouled up, he fouled up.
>
> Farmer: [Brewer] claims he didn't know, he had nothing to do with eligibility.
>
> Fordham: You sit here and have him call you day in and day out though; he better have something to do with it, he better know.

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[45] Deposition of Ken Brewer, p. 101; Purvis affidavit at P.14.

Farmer: In other words, if he didn't know, he should have known.

Fordham: He should have known.[46]

On June 25-27, 1991, a PPC hearing Tribunal convened. Mr. Brewer was present and represented by counsel. The Tribunal concluded that plaintiff committed "an act or acts constituting other good and sufficient cause" within the meaning of the rules of the PPC so as to justify disciplinary action against Mr. Brewer's teaching certificate.[47]

DISCUSSION

Plaintiff contends that the Defendants violated his right to equal protection and his due process rights under the constitution of the United States and the Georgia Constitution by depriving him of his property interests in his coaching and teaching positions and of his liberty interest in his reputation. Plaintiff also claims that he was libeled by the

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[46] Fordham Affidavit at P.13.

[47] Stroud Affidavit, Exh. "D".

Defendants.

FEDERAL LAW CLAIMS

II. EQUAL PROTECTION

Defendant Purvis has moved for summary judgment on plaintiff's equal protection claim. Plaintiff conceded this claim by his failure to respond to Defendant's motion on this issue. claim. Consequently, Defendant Purvis' motion for summary judgment on plaintiff's equal protection claim is **GRANTED.**[48]

II. DUE PROCESS DEPRIVATION OF PROPERTY

The language of 42 U.S.C. § 1983 does not create substantive rights; rather, it merely provides remedies for deprivation of rights established elsewhere. *Oklahoma City v Tuttle,* 471 U.S. 808, 816, 106 S. Ct. 16, 85 L.Ed.2d 695 (1985). In order to sustain a cause of action under section 1983, a plaintiff must show that the defendant deprived him of a right secured by

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[48]The Court notes that the record is devoid of any evidence that would support an equal protection claim.

the Constitution or the laws of the United States and that the deprivation was committed by a person acting under color of state law. *West v Atkins*, 487 U.S. 42, 108 S.Ct. 2250, 2255, 101 L.Ed.2d 40 (1988).

A. PPC, SCHACHT and GOOD

Plaintiff contends that the PPC's recommendation that plaintiff's teaching certificate be suspended for two years deprived him of his property interest without due process of law. Defendants argue, however, that Plaintiff's lawsuit is barred under the Eleventh Amendment. Defendants Schacht and Good further contend that they are entitled to qualified immunity.

1. Eleventh Amendment Immunity

The Eleventh Amendment states: "[t]he Judicial power to the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any Foreign State.

U.S. Const. Amend. XI.[49] The amendment "is a specific constitutional bar against hearing even *federal* claims that otherwise would be within the jurisdiction of the federal courts. *Pennhurst State Sch. & Hosp. v. Halderman, ("Pennhurst II")*, 465 U.S. 89, 120, 104 S.Ct. 900, 919, 79 L.Ed.67 (1984) (emphasis in original). The bar is present "even when the state is not named as a party of record, if for all practical purposes the action is against the state. *Schopler v Bliss*, 903 F.2d 1373, 1378 (11th Cir. 1990).

Eleventh Amendment immunity may be waived, however, by explicit Congressional enactment or a state may consent to be sued in federal court. *Robinson v Georgia Dept. of Transp.*, 966 F.2d 637, 640 (11th Cir. 1992). In *Quern v Jordan*, the Supreme Court held that Congress did not

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[49]The Eleventh Amendment also bars suits against a state by its own citizens. *Edelman v Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed2d 662 (1974).

abrogate states' eleventh amendment immunity when it enacted 42 U.S.C. § 1983. 440 U.S. 332, 341, 99 S.Ct. 1139, 1145, 59 L.Ed. 358 (1979). Thus, the PPC's, Good's, and Schacht's eleventh amendment immunity has not been abrogated by Congress. The Court further concludes that Georgia has not waived its Eleventh Amendment immunity.

Suits against state agencies seeking monetary damages are considered as suits against the state itself. *See Employees of Dept. of Public Health and Welfare, Missouri v. Dept. of Public Health and Welfare, Missouri,* 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973). Plaintiff, however, argues that the PPC and Defendants Schacht and Good in their official capacities should not be barred because Georgia has waived its immunity by purchasing a $5,000,000 state employee liability policy. A state's Eleventh Amendment immunity is waived only if it unequivocally indicates that it "intends to consent to federal jurisdiction that

otherwise would be barred by the Eleventh Amendment." *Atascadera State Hosp. v Scanlon,* 473 U.S. 234, 238 n. 1, 105 S.Ct. 3142, 3145 n.1, 87 L.Ed.2d 171 (1984). Therefore, waiver will not be found unless "stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction." *Fouche v Jekyll Island-State Park Authority,* 713 F.2d 1518 (11th Cir. 1983).

The Georgia Constitution states in relevant part:

> Sovereign immunity extends to the state and all of its departments and agencies...[T]he defense of sovereign immunity is waived as to these actions for the recovery of damages for any claim against the state or any of its departments and agencies for which liability insurance protection is provided. No waiver of sovereign immunity shall be construed as a waiver of immunity provided to the state or its departments

and agencies provided by the United States Constitution.

GA. CONST. Art. 1 § 2, P. 9 (1983)[50] (emphasis added). As the last sentence indicates, although Georgia waived its sovereign[51] immunity and

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[50] This section of the Georgia Constitution was amended in 1991 to delete provisions that waived Georgia's sovereign immunity when liability insurance was present. The amendment, however, is inapplicable because the conduct, which gave rise to Plaintiff's claims, occurred in 1989 and 1990. *See Curtis v Bd. of Regents,* 262 Ga 226, 416 S.E.2d 510 (1992)(waiver not withdrawn by passage of 1991 amendment). Even if the amendment were applicable the result would be the same since the provisions reserving Eleventh Amendment immunity was preserved.

[51] Sovereign immunity and eleventh amendment immunity are two distinct concepts. *Karpovs v State of Mississippi,*

consented to be sued in its own courts when liability insurance was present, it specifically reserved its Eleventh Amendment immunity. Therefore, since the state has not waived its immunity, this Court does not have subject-matter jurisdiction over the claims against the PPC.[52] The Court next turns to the question of whether Defendants Schacht and Good are entitled

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663 F.2d 640, 645 (5th Cir. 1981). A waiver of sovereign immunity does not dictate a waiver of Eleventh Amendment immunity. Id.

[52] The plaintiff argues that these defendants obviously were comfortable with this Court's subject-matter jurisdiction because Defendants removed this case to federal court. While plaintiff is correct that these Defendants agreed to the removal, subject-matter jurisdiction cannot be waived. *See, e.g., Owens Equip. & Erection Co. v Kroger,* 437 U.S. 365, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978).

to Eleventh Amendment immunity.

Eleventh Amendment immunity applies to suits against officials in their official capacities. *Pennhurst State School & Hosp. v Halderman,* 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1983). It does not preclude an award of damages against defendants sued in their personal or individual capacities. *Hafer v Melo,* ___ U.S. ___, ___, ___, 112 S.Ct. 358, 364-365, 116 L.Ed.2d 301 (1991); *Gamble,* 779 F.2d at 1512. Plaintiff's complaint does not specify whether he is suing Schacht and Good in their official capacity or individual capacities or both.[53] Frequently, a complaint will not

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[53]Although the courts may consider the caption of a case as a factor in determining whether a defendant has been sued personally or in his official capacity, *see Ludgren v McDaniel,* 814 F.2d 600, 604 n.2 (11th Cir. 1987), the caption in the present case does not indicate one way or the other.

indicate whether the defendants are sued in their individual capacities, official capacities or both. *Kentucky v. Graham*, 473 U.S. 159, 167 n. 14, 105 S.Ct. 3099, 3106 n. 14, 87 L.Ed. 114 (1985). Nonetheless, "'the course of the proceedings' typically will indicate the nature of the liability sought to be imposed." Id. (citation omitted).

The Eleventh Amendment protects Good and Schacht if plaintiff "is reasonably seeking relief from the state coffers. *Gamble*, 779 F.2d at 1513. In arguing that defendants waived their Eleventh Amendment immunity the Plaintiff states "Georgia's fiscal integrity will remain intact due to its insurance protection."[54] Thus since plaintiff is seeking to have any potential judgment satisfied by the state, plaintiff is suing Schacht and Good in their official

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[54] Plaintiff's brief in opposition to Defendant's Hans J. Schacht, Chris Good, and the Professional Practices Commission Motion for Summary Judgment, p. 13.

capacities.[55] Unfortunately, this conclusion raises troubling issues for the court, which have not been addressed by any of the parties.

2. Subject Matter Jurisdiction

The Eleventh Amendment is a specific limitation on the grant of jurisdiction under Article III of the United States Constitution. *Hobbs v Georgia Dept. of Transp.*, 785 F.Supp. 980, 986 n.10 (N.D.Ga. 1991). This case was removed to this court on March 20, 1991.

Plaintiff's motion to remand,[56] which was

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[55] The Court does not reach Good and Schacht's contention that section § 1983 suits may not be pursued against a state officials in their official capacities, *Will v Michigan Dept. of Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed. 45 (1989), since it has concluded the two are entitled to Eleventh Amendment immunity.

[56] Plaintiff did not argue that the Eleventh Amendment was a jurisdictional bar to removal.

denied, was opposed by all the defendants. Consequently, the state Defendants' Eleventh Amendment immunity defense raises the issue of a lack of subject matter jurisdiction.

Under 28 U.S.C. § 1441 only civil actions that are within the original jurisdiction of the district court may be removed. *McKay v Boyd Const. Co. Inc.*, 769 F.2d 1084, 1087 (5th Cir. 1985). The phrase "civil action" means "the entirety of the proceedings in question, not merely" claims or parties. *Arango v Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1376 (5th Cir. 1980). A district court must remand a case if it discovers, at any time prior to final judgment, that it lacks subject matter jurisdiction. 28 U.S.C. § 1447. Undoubtedly, the claims against the PPC, Schacht and Good in their official capacity were improperly removed. The question is whether, in light of § 1441 and 1447 (c), a state defendant's Eleventh Amendment immunity defense completely divests this court subject-matter jurisdiction even when other

federal claims against other defendants are present such that the entire action must be remanded to the state court.

In *McKay* a plaintiff sues a state highway department and a private contractor for negligence. the fifth Circuit concluded that the case had been improperly removed because the state had eleventh Amendment immunity, and therefore, the presence of the state as a co-defendant required that the action against the private contractor also be remanded. The Court concludes that the present case is distinguishable from *McKay*.

The Supreme Court has indicated that the Eleventh Amendment jurisdictional bar acts to preclude individual claims rather than entire cases. *Henry v Metropolitan Sewer Dist.*, 922 F.2d 332. 338 (6th Cir. 1990); *but see Simmons v State of Cal. Dept. of Indus. Rel.*, 740 F.Supp. 781, 786 (E.D.Cal. 1990) (removal improper as to all defendants despite presence of federal questions when Eleventh Amendment

immunity present). In *Pennhurst II*, which held that pendant jurisdiction cannot override the protection of the Eleventh Amendment, the Supreme Court states "[a] federal court must examine each *claim* in a case to see if the court's jurisdiction over that *claim* is barred by the Eleventh Amendment." *Henry*, 922 F.2d at 337; *See Roberts v College of the Desert*, 870 F.2d 1411, 1415 (9th Cir. 1988) ("even if the [state defendant] is shielded from suit by the state's sovereign immunity, we have jurisdiction to consider the merits of [the plaintiff's] appeal because she could still recover from the individual defendants in their individual capacity.") Consequently, "to the extent that *McKay* forecloses consideration of claims unaffected by the eleventh amendment in favor of remand pursuant to 28 U.S.C. § 1447 (c) [this Court] rejects as fundamentally incompatible with ... *Pennhurst II*." *Henry at* 339.

Thus, the court concludes that it need not remand the entire case to the state court.

Rather the Court, according to *Pennhurst II*, may limit its remand to the claims against the PPC, and Defendants Schacht and Good in their official capacities.[57] *See Roberts*, 922 F.2d at 1415. Accordingly, the claims against Good and Schacht in their individual capacities are REMANDED to the Clarke County Superior Court.

The Court now turns to plaintiff's claims against Good and Schacht in their individual capacities. If a Plaintiff seeks to "proceed against the officer only because he acted without proper authority, the judgment may not compel the State to use its funds to compensate the plaintiff for the injury. *Florida v. Treasure Salvors, Inc.*, 458 U.S. 670, 689, 102 S.Ct. 3304, 3317, 73 L.Ed.2d 1057 (1982). Thus,

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[57] The Eleventh Amendment does not present a bar to section 1983 claims against state officials in their individual capacity. *Scheuer v Rhodes*, 416 U.S. 232, 237-38, 94 S.Ct. 1683, 1686-1697, 40 L.Ed.2d 90 (1974).

any allegation that defendants Schacht and Good exceeded their authority is subject to a qualified immunity, rather than an Eleventh Amendment immunity, defense.[58] The difficulty is determining which claims are against the individual defendants in their individual capacities.[59]

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[58] Contrary to Plaintiff's assertion, any action taken by Schacht and Good in their official capacities does not abrogate a qualified immunity defense since qualified immunity is not a defense official capacity claims.

[59] Since Schacht and Good have raised the qualified immunity defense they have acknowledged that they were also sued in their individual capacities. *See Lundgren v McDaniel*, 814 F.2d 600, 603-604 (11th Cir. 1987) (defendants sued in personal capacity because they raised qualified immunity defense, which is inapplicable to official capacity suits).

A review of the Complaint shows that plaintiff makes a number of allegations that Schacht, Good and the PPC together acted in an arbitrary and capricious manner, with malice and in bad faith.[60] this is not an individual capacity claim. Paragraph 32, which alleges that defendant Good acted outside his statutory authority when he testified at a GHSA hearing,[61] is the only paragraph which specifically allege an individual capacity claim. The Court hesitates to address the issue of qualified immunity until he Plaintiff clarifies the

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[60] *See* Complaint at PP. 24-34.

[61] Paragraphs 33 and 34 allege that Good acting as the agent of the PPC started his investigation before he received an official request to do so. The Court finds it difficult to determine if this is a claim against Good in his individual capacity or official capacity since Plaintiff is alleging that the agency exceeded its authority.

specific claims that relate to Good and Schacht in their individual capacities. Consequently, the Court reserves its ruling on these claims and **DIRECTS** the plaintiff to submit a short brief within 10 days from receipt of this order specifying all claims against Good and Schacht, concerning plaintiff's property and liberty interests, in their individual capacities. defendants may respond, if necessary, within five days of plaintiff's submission.

B. CCSD & Purvis - Deprivation of Property

Defendants CCSD and Purvis concede that plaintiff had tenure in his teaching position. Defendants, however, argue that Plaintiff did nit have tenure in his supplemental duty assignment as a coach. The Constitution itself does not create property interests. *Board of Regents v Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). "rather they are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law..." *Id.;*

Cleveland Bd. of Ed., 470 U.S. 532, S.Ct., L.Ed.2d (1982). Therefore, the first inquiry is whether Georgia's statutory scheme gave Plaintiff a property interest or legitimate claim of entitlement to his coaching position. *Hatcher v Bd. of Public Ed.*, 809 F.2d 1546, 1551 (11th Cir. 1987).

I. Coaching Position

Georgia law created a property interest in continued employment for tenured teachers, i.e. one who accepts a school year contract for the fourth consecutive year from the same local board of education. *Hatcher* 809 F.2d at 1550; O.C.G.A. § 20-2-942 (b)(1). A tenured teacher may be demoted or not have his contract renewed for the reasons set forth in O.C.G.A. § 20-2-940 (a) pursuant to the procedural protection in O.C.G.A. § 20-20942 (b)(2), which requires that the teacher be given written notice of the board's intention and the right to be represented by counsel at a full hearing before the board. *Id.*

The Georgia appellate courts have not addressed the issue of whether or not a teacher gains tenure in a supplemental duty position.[62] Therefore, the Court turns to the

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[62] The authority on which Plaintiff relies, *Rockdale County School Dist. v Weil* 245 Ga 730, 266 S.E.2d 929 (1980) and *Ellis-Adams v. Whitfield County Bd. of Ed.* 182 Ga App 463, 356 S.E.2d 219 (1987), do not stand for the proposition that a teacher has tenure in his supplemental duty position. In *Ellis-Adams* the plaintiff was reassigned from her position as Language Arts Coordinator for the district to a classroom teacher position. The plaintiff in *Weil* was a school principal who had been reassigned to be the coordinator of an alternative school program. Thus, in these cases, which concern the issue of whether plaintiff has tenure, the plaintiffs in *Weil and Ellis-Adams* had tenure in their respective

applicable statutory scheme to determine whether plaintiff had tenure in his position as head football coach. The Georgia Code refers to a teacher with a "contract for employment", O.C.G.A. § 20-2-940(a), and defines "school year contract" as "a contract of full-time employment between a teacher and a local board of education." O.C.G.A. § 20-2-942(a)(3). In the instant case there is no evidence that plaintiff

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positions and the issue was whether a demotion, which would entitle them to a due process hearing, had occurred. Absent tenure, Plaintiff is not entitled to a due process hearing before being removed even if Plaintiff suffered a loss in prestige, pay, and responsibility. Furthermore, *Holley v Seminole County Sch. Dist.* 755 F.2d 1492 (11th Cir. 1985) is distinguishable from the instant case. Although the plaintiff in *Holley* coached football, he sued because his *teaching* contract was not renewed.

had a written contract for his coaching position. The supplement he received for coaching was not included in his teaching contract. Consequently, the Court concludes that a coaching position, which is not guaranteed by a written contract for a definite term, falls outside the protection of the statute. *see Freeman v Hinson*, No. C76-1351 (N.D. Ga. 1977) (no property interest in position of department chairman).

Furthermore, the Georgia State Board of Education has consistently held that teaching contracts do not include supplemental duty positions. *See Copeland v Clarke County Bd. Educ.*, Case No. 1988-43, (position of lead teacher), *aff'd*. J. Gaines, Civil Action No. SU-89-CV-0185 (Superior Court, Western Judicial Circuit, July 13, 1989); *Bonner v Fulton County Bd. Educ.*, Case No. 1989-24 (State Board of Ed., Dec. 14, 1989)(no tenure in chairperson and coaching positions); *Arp v Breman City Bd. of Educ*. No. 1985-16 (State Bd. of Educ., Sept. 12,

1985) (O.C.G.A. § 20-2-942 applies only to position under which individual had a contract to perform).

Finally, the Court notes that a number of state and federal courts have concluded that teachers do not acquire tenure in coaching positions. *See, e.g., Lagos v. Modesto City Schools Dist.*, 843 F.2d 347 (9th Cir.), *cert. denied*, 488 U.S. 926, 109 S.Ct. 309, 102 L.Ed.2d 328 (1988); *Jett v Dallas Indep. Sch. Dist.*, 798 F.2d 748 (5th Cir. 1986), *modified on other grounds*, 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989); *Slockett v. Iowa Valley Community Sch. Dist.*, 359 N.W.2d 446 (Iowa, 1984); *Tate v. Livingston Parish Sch. Dist. U-46 v. Kossoff*, 419 N.E.2d 658 (Ill. App. 1981); *Maupin v. Indep. Sch. Dist.*, 632 P.2d 396 (Okla. 1981); *White v. Banks*, 614 S.W.2d 331 (Tenn. 1981); *Stang v Indep. Sch. Dist.*, 256 N.W.2d 82 (Minn. 1977); *Chiodo v Bd. of Educ.*, 215 N.W.2d 806 (Minn. 1974). As noted in *Tate* "[w]hile such decisions are not controlling and can be

distinguished on their facts, or on differences in the tenure acts or certification requirements, they are significant in their unanimity in denying tenure to coaches. 444 So.2d at 221. Consequently, the Court concluded that since Plaintiff did not have a property interest in his coaching position, he was not entitle to a pre-termination hearing.

2. Teaching Position

Plaintiff also alleges that he was terminated from his teaching position without a hearing in violation of his due process rights. Defendant was entitled to a termination hearing if he was fired from his tenured teaching position. O.C.G.A. § 20-20-942 (b)(2). Although he submitted his resignation, Plaintiff asserts that he was constructively discharged. Defendants, however, contend that there is no evidence, which would support a claim of constructive discharge, and that the evidence shows that the resignation was voluntary.

Constructive discharge is a mixed question

of law and fact. *Garner v Wal-Mart Stores, Inc.*, 807 F.2d 1536, 1538 (11th Cir. 1987). The test for constructive discharge is whether a reasonable person in the employee's position would have felt compelled to resign, *Downey v Southern Natural Gas Co.*, 649 F.2d 302, 305 (5th Cir. 1981), a question which the Court has the power to decide. *Shawgo v Spradlin*, 701 F.2d 470, 481 n. 12 (5th Cir. 1983); *see, e.g., Jurgens v E.E.O.C.*, 903 F.2d 386, 391 (5th Cir. 1990).

Defendant CCSD argues that the present case is analogous to *Jett v Dallas Indep. Sch. Dist.*, 798 F.2d 748 (5th Cir. 1986), *modified on other grounds*, U.S., 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989). In *Jett* a high school teacher who was head football coach and athletic director at one high school was reassigned to teach and coach freshman football and track at another school. The Fifth Circuit concluded that the evidence was insufficient to support a claim of constructive discharge stating:

"Jett tendered his resignation ... stating that, after considering his assignment to Thomas Jefferson High School, he could not accept the position and felt 'forced to resign from the public education field with much sorrow and humiliation.' Jett argues that his significant loss in coaching responsibilities as well as the racial discrimination and the retaliation of his protected speech that prompted his reassignment amounted to a constructive discharge.

Although a demotion or transfer in some instances may constitute a constructive discharge, we find that Jett's loss of coaching responsibilities was not so intolerable that a reasonable person would have felt compelled to resign. We have noted that constructive discharge cannot be based on the employee's subjective preference for one position over another. [citation omitted] ... Moreover,

> the humiliation and embarrassment that [plaintiff] suffered are not significant enough to support a constructive discharge. *See Shawgo* 701 F.2d at 481-82 (publicity and derogatory comments resulting from disciplinary proceedings were not constructive discharge); *Junior [v. Texaco, Inc.,]* 688 F.2d 377, 380 (5th Cir. 1982) (unfavorable work evaluations not constructive discharge). Id. at 755-56.

The Court acknowledges that the instant action is distinguishable because plaintiff's humiliation and emotional distress were produced both by the reason he lost the position, i.e. allegedly improper grade changes made by other teachers, which were approved by the guidance counselor and the principal,[63] and by the loss

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[63] After Purvis explained plaintiff's options the Plaintiff testified he said "I don't need to go back to the classroom ... my hearts not in it...I've been slandered and put down through this whole thing."

of the position itself. Unless extreme, however, loss of prestige, humiliation and embarrassment do not constitute a constructive discharge. *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114, 119 (1st Cir. 1977).

Furthermore, "[p]art of the employee's obligation to be reasonable is an obligation not to assume the worst, and not to jump to conclusions too fast." *Bourque v Powell Electrical Mfg. Co.*, 617 F.2d 61, 65 (5th Cir. 1980). The evidence shows that Brewer never returned to work after he was dismissed as head football coach. This case is distinguishable from the situation where a plaintiff is given the option of resigning or being fired. *See, e.g., Downey*, 649 F.2d 302 (5th Cir. 1981) (superior told older employee he might be discharged with subsequent loss of benefits so plaintiff resigned). When Purvis informed Brewer that his request for leave had been denied he told Brewer that he could return to work, not

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Brewer Deposition, p. 101.

report to work and be fired or resign.[64] Plaintiff was not given an either/or option. Rather, he was told that if he did not *return to work* he would be fired. Instead of reporting to work, Brewer called Purvis the next day and told him that he could not get a letter of resignation to him until Monday because his attorney was in court. Brewer subsequently submitted his resignation on March 26, 1990.

The facts of this case do not support a claim for constructive discharge. Cases in which summary judgment has been denied on this issue have involved intolerable working conditions

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[64] In his affidavit dated Feb. 14, 1992, Plaintiff stated that Purvis told him that if he did not have his resignation on his desk the next morning he would be fired. This assertion contradicts plaintiff's deposition testimony in which he states that he was told he would be fired if he did not return to work.

while the plaintiff was on the job. *See, e.g., Stephens v. C.I.T. Group/Equip. Financing, Inc.*, 955 F.2d 1023 (5th Cir. 1992) (demoted plaintiff asked to train and to report to young successor, to explain his demotion and to introduce successor to defendant's biggest client, deprived of all supervisory responsibilities and pay cut); *Goss v Exxon Office Systems, Co.*, 747 F.2d 885 (3rd Cir. 1984) (plaintiff's supervisor verbally abused her when she decided to become pregnant, assigned her sales territory to a man despite her success and gave her an ultimatum to accept her reassignment or resign when she pursued in-house remedies); *Levendos v. Stern*

Entertainment, Inc., 860 F.2d 1227 (3d Cir. 1988) (female excluded from management meetings and not permitted to order supplies even though males in her position had been allowed to do so, falsely accused of stealing and drinking on the job and had stolen goods placed in her locker to implicate her); *Mayer v Brown & Root Constr. Co.*, 661 F.2w 369 (5th Cir. 1981) (defendant transferred pregnant worker to position that would have endangered health of child). The Court does not think the Defendants' request to that Plaintiff to return to work imposed intolerable work condition that would cause a reasonable person to resign. Furthermore, it was unreasonable for Plaintiff to refuse to return to work. Accordingly, defendant's CCSD's and Purvis' motion for summary judgment on the issue of due process in relation to Plaintiff's teaching and coaching positions are GRANTED.

C. GHSA and FORDHAM

GHSA and Fordham argue that they are not state actors and did not deprive Plaintiff of

any protected right or interest.

1. State Actors

The fourteenth amendment does not protect against private action, no matter how unfair that action may be. *Shelley v. Kraemer,* 334 U.S. 1,13, 68 S. Ct. 836, 842, 92 L.Ed. 1161 (1948). "[T]he ultimate issue in determining whether a person is subject to suit under § 1983 is the same question posed in cases arising under the fourteenth amendment: is the alleged infringement of federal rights 'fairly attributable' to the State'" *Randall-Baker v. Kohn.*, 457 U.S. 830, 838, 102 S.Ct. 2764, 2769, 73 L.Ed.2d 418 (1982) (quoting *Luger v Edmondson Oil*, 457 U.S. 922, 957, 102 S. Ct. 2744, 2753, 73 L.Ed.2d 482 (1982).

State action is present in two sets of circumstances. First, the state action is present where the "actor" is the "state itself, a state agency, a political subdivision of the state, or a public employee." *Newton v Southeast Alabama Gas Dist.*, 708 F.Supp. 1254, 1257 (M.D.

Ala. 1989). Second, state action is also present where the actor is a private entity if it is deemed a state actor by virtue of its functions and its relationship with the state. Id. Traditionally, courts have found that high school athletic associations are state actors. *See Louisiana High School Athletic Ass'n v. St. Augustine High School,* 396 F.2d 224, 227 (5th Cir. 1968); *Mitchell v Louisiana High School Athletic Ass'n.,* 616 F.2d 152, 156, *reh'g denied,* 621 F.2d 440 (5th Cir. 1980), *and cert denied,* 449 U.S. 1124, 101 S.Ct. 939, 67 L.Ed.2d 109 (1981). Defendants, however, contend that since the Supreme Court's decision in *Randall-Baker and Blum v Yaretsky,* 457 U.S. 991, 102 S.Ct. 2777, 73 L.ed.2d 534 (1982), the lower courts have unanimously held that such athletic associations do not act under color of law. The Court, however, notes that almost every case cited by the Defendants to support this assertion involves that National Collegiate Athletic Association, which is distinctly

different from a high school athletic association as acknowledged by the Supreme Court in *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 109 S.Ct. 454, 102 L.Ed.2d 469 (1988).[65]

In *Tarkanian* the Supreme Court, in reaching its conclusion that the NCAA was not a state actor, stated "the source of the legislation adopted by the NCAA is not Nevada but the collective membership, speaking through the organization that is independent of any particular state. 488 U.S. at ___, 109 S.Ct. at 462. In a footnote the Supreme Court stated

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[65] The other authority cited by Defendants, *Anderson v. Indiana High School Athletic Association*, 699 F.Supp. 719 (S.D.Ind. 1988), was decided before *Tarkanian*.

"[t]he situation would, of course, be different if the membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign." Id. at 13 (*citing Clark v Arizona Interscholastic Ass'n*, 695 F.2d 1126 (9th Cir. 1982), *cert. denied*, 464 U.S. 818, 104 S.Ct. 79, 78 L.Ed. 2d 90 (1983); *Louisiana High School Athletic Assoc. v. St. Augustine High School*, 396 F.2d 224, 227 (5th Cir. 1968)). Thus, an athletic association whose membership is predominated by institutions created by the same sovereign is a state actor. *see Libby v. South Inter-Conference Ass'n*. 728 F. Supp. 504, 507 (N.D.Ill. 1990). Consequently, the Court concluded that the Defendants are state actors.

2. Property Interest

Defendants next assert that the Plaintiff was not deprived of a federally protected right, privilege or immunity. Plaintiff contends that the Defendants denied him his property interest

in his job.[66] Generally, cases in which the decisions or rules of a high school athletic association have been challenged have involved a student or a high school plaintiff. *See, e.g., Mitchell,* 430 F.2d at 1156; *Walsh,* 616 F.2d at 155, *St. Augustine High School,* 396 F.2d at 225. In this case, Plaintiff is challenging a decision against Cedar Shoals High School. Plaintiff does not have a federally protected property interest in the games CSHS won. Even if, however, these defendants' actions affected plaintiff's job as a coach or as a teacher, summary judgment is still appropriate since the Court has already concluded that Plaintiff did not have tenure in his coaching position and he was not deprived of his teaching position without due process of law. Consequently, GHSA's and Fordham's motion for summary judgment on plaintiff's claim that he was deprived of his

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[66] Plaintiff specifically contends that GHSA's decision caused him to lose his job and made him unemployable.

property interest without due process of law is GRANTED.

II. DUE PROCESS DEPRIVATION OF LIBERTY

In *Roth v. Bd. of Regents,* 408 U.S. 564, 573, 92 S.Ct. 2701, 2707, 33 L.Ed. 2d 548 (1972) the Supreme Court stated that a plaintiff must allege either public disparagement damaging to his standing in the community or a stigmatic injury in an employment interest likely to impair future work-related opportunities in order to invoke the procedural due process protection for a claim of injury to a liberty interest. The Eleventh Circuit standard for determining whether the deprivation of an individual's liberty interest has occurred requires the plaintiff to prove: (1) a false statement (2) of a stigmatizing nature (3) attending a governmental employee's discharge (4) made public (5) by the governmental employer (6) without a meaningful opportunity for employee name clearing. *Buxton v Plant City, Florida,* 871 F.2d 1037, 1042 (11th Cir. 1989).

A. CCSD

Brewer claims that the PPC's investigative report to the public and press after the report has been presented to Hans Schacht at the CCSD meeting on Feb. 1, 1990, deprived him of his liberty interest in his reputation without due process of law. CCSD, however, first argues that Plaintiff has not established the falsity element necessary to implicate his liberty interest. A review of the PPC's preliminary investigative report shows that it called Plaintiff's honesty into question, implied that he had been previously involved in grade changing incidents,[67] implied he took part in

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[67] The report states "Mr. Brewer's statements, which contain only partial and benign admissions, cannot be regarded as creditable [sic]. His statements lack persuasiveness all the more, since this present matter *is not an isolated incident in his career*. Stroud Affidavit. Exh. "E". at 20 (emphasis added).

improper grade changes, attacked his leadership abilities and alleged he knew of the improper activities designed to gain the eligibility of J.C.[68] The Hearing Tribunal Report[69] did not address the allegation that Plaintiff had been previously involved in grade changing incidents. Furthermore, the investigative report gave the impression that plaintiff intentionally and actively sought to gain the eligibility for J.C. by grade changes, which he knew to be improper. Although the hearing tribunal concluded that the actions were proper, it acknowledged that Clarke County School System did not have a formal written policy regarding grade changes at the time the changes were made and that CSHS's principal had approved the grade changes. therefore, after reading both documents in a light most favorable to the Plaintiff and drawing all inferences in his favor, *Blackston v. Shook & Fletcher Insulation Co.*, 764 F.2d

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[68] Stroud Affidavit, Exh. "E".

[69] Stroud Affidavit, Exh. "D".

1480, 1482 (11th Cir. 1985), the Court concludes that the plaintiff has presented evidence of a false statement in his claim against CCSD.

Next, CCSD contends that Plaintiff cannot establish the third element because he was not terminated from his teaching position. Damage to one's reputation, standing alone, is not protected by the Fourteenth Amendment Due Process Clause. *Emory v Peeler,* 756 F.2d 1547, 1554 (11th Cir. 1985) (*citing Paul v Davis* 424 U.S. 693, 700-02, 96 S.Ct. 1155, 1160-61, 47 L.Ed.2d 405 (1976)). Rather, "damage to reputation must be coupled with the denial of a more tangible interest, such as the loss of employment, to warrant the fourteenth amendment due process protection delivered by Section 1983." Id. Nevertheless, the liberty interest survives even if the plaintiff does not have a property interest in his position when statements are made in the context of a termination. *See, e.g., Codd v Velger,* 429 U.S. 624, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977);

Campbell v Pierce County, 741 F.2d 1342 (11th Cir. 1984) *cert denied*, 470 U.S. 1052, 105 S.Ct. 1754, 84 L.Ed.2d 818 (1985).

While the Court agrees that plaintiff was not terminated from his teaching position, it is disingenuous to suggest that he was not fired from his coaching position. The question is whether the termination of his coaching responsibilities is sufficient to invoke the due process protection of the fourteenth amendment. In *Campbell*, the plaintiff was an at-will employee who suffered damage to her reputation when the transcript from the Commissioner's meeting at which she was dismissed was published. Similarly, this plaintiff had an at-will coaching contract with the Clarke County School District and the PPC's investigative report was read at a CCSD meeting two days before he was discharged from his coaching position. Although *Campbell* is distinguishable because, unlike Brewer, the plaintiff in *Campbell* did not remain employed in any

capacity; this Court concludes that CCSD's decision to relieve Plaintiff from his position as head football coach is significant enough to implicate his liberty interest.

In *Smith v Bd. of Educ. of Urbana Sch. Dist. No. 116,* 708 F.2d 258 (7th Cir. 1983) and *Schneeweis v Jacobs,* 771 F.2d 733 (E.D.Va. 1991), the courts assumed, without deciding, that the plaintiff's had a liberty interest in their coaching positions even though they had not been terminated from their teaching positions. In *Smith* the plaintiffs were physical education teachers who were dismissed from their head coaching positions but retained in their teaching positions. In concluding that the plaintiff were not stigmatized by the school board members statements, the Court stated that the Constitution required that the school board members "not make public statements so critical of plaintiff's coaching abilities that it would be virtually impossible for them to *find new employment in similar coaching positions.*"

Smith, 708 F.2d at 265 (emphasis added). In *Schneeweis* the district court held that a high school basketball coach's liberty interest in her reputation was not implicated when she was suspended because a temporary suspension was not an injury to employment.[70] Thus, both *Smith* and *Schneeweis* implicitly recognized that termination of the coaching position alone would satisfy the termination requirement.

The Court finds this reasoning sounder than the reasoning in *Diehl v. Albany County Sch.*, 694 F. Supp. 1534, 1538 (D. Wyo. 1988), which held that a plaintiff whose high school basketball coaching contract was not renewed could not succeed on his liberty interest claim because he retained his teaching position and continued to coach at the junior high level, for three reasons. First, *Diehl* relied on *Danno v Peterson*, 421 F.Supp. 950 (N.D.Ill. 1976), which

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[70] The district court also concluded that no stigmatizing statements had been made.

held that a plaintiff's liberty interest was not implicated when he was transferred from an administrative position to a teaching position. In contrast to the plaintiff in *Danno* who worked for the school board in one position and was reassigned to another, Brewer was employed by the school district in two distinct positions: as teacher and as head football coach. Plaintiffs have implicitly concede this point in their arguments concerning Plaintiff's lack of tenure in his coaching position. Therefore, the present case is distinguishable from *Danno*.

Second, in *Danno*, the district court stated:

> The plaintiff in this action may well wish to seek other employment opportunities, however, he is still employed by the defendant school board. Whatever stigma may have been inflicted by the board in the allegedly defamatory remarks is greatly diminished by the simultaneous action assigning him to the position of teacher

> and continuing his employment in that significant capacity ... the alleged stigma is minimized by his continued employment.

421 F.Supp. at 954. This Court does not see how any alleged stigma in the present case was diminished by the decision to retain Plaintiff in his teaching position. Plaintiff testified that he wanted to get back into coaching and that the jobs he looked for involved coaching positions.[71] Unlike the plaintiff in *Diehl* who retained other coaching responsibilities, however, Brewer was completely removed from coaching. If he desires to coach he is compelled to seek other employment and the statements made may have affected his employment opportunities. Schools actively recruit teachers to fill specific coaching positions. For example, Plaintiff testified that high schools in other counties tried to hire him to fill head football coach positions while he was coaching at

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[71] Deposition Ken Brewer, p. 103.

CSHS.[72] Furthermore, the articles that appeared in the local Athens' newspaper when Plaintiff was hired as a head football coach.[73] Thus, the stigma attached to plaintiff's conduct as a coach is not minimized by his continued employment as a teacher. Accordingly, for the reasons discussed, the Court concluded that there was a termination of employment.

Finally, defendant CCSD argues that even if the statements were made in an employment termination context Plaintiff had an opportunity to clear his name at the PPC hearing. *Buxton* indicates that the *governmental employer* must provide a meaningful opportunity for a name-clearing hearing. 871 F.2d at 1042. CCSD never

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[72] Deposition of Ken Brewer, p.106-109.

[73] Plaintiff's response to Defendant Clarke County School District's Motion for Summary Judgment, Exh. A.

provided Plaintiff with any opportunity to clear his name.

Moreover, even if the PPC hearing could cure CCSD's failure to provide a hearing, Plaintiff has provided evidence that the hearing was not provided at a meaningful time. Hearings granted in cases in which a liberty interest involving reputation is implicated serve to allow the employee to clear his name. *Buxton*, 871 at 1046. "'[T]he hearing need not take place prior to [the employee's] termination or to the publication of related information adverse to his interests.'" *Id. (quoting Campbell,* at 1345). Thus, the name-clearing hearing is eventually provided, due process is not violated. The Court disagrees.

Due process requires that a hearing be held at a meaningful time. *Mathews v Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 832,902, 47 L.Ed.2d 18 (1976). In *Campbell* the Eleventh Circuit implied that due process was violated when "a substantial amount of time elapsed between the

claimant's termination and the 'name-clearing' hearing." *Campbell* at 1346 (plaintiff could not prevail on her claim for damages under § 1983 because she had been provided with a constitutionally adequate name-clearing hearing within 14 days of her dismissal; *see also Endicott v Huddleston,* 644 F.2d 1208, 1216-17 (7th Cir. 1980) (three year delay in providing name-clearing hearing could give rise to compensable damages).[74] In this case the PPC's hearing for the Plaintiff was over one year and four months after he was relieved of his head coaching responsibilities, and four months after

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[74] The court said the plaintiff could recover for the cost of attorney's fees in getting second hearing through the mandamus action in state court. The court further noted that the plaintiff would "have been entitled to recover damages for injury to reputation between the time he was denied due process and the time of the second hearing. *Endicott,* at 1217.

he filed suit. While Plaintiff did not have to wait as long as the plaintiff in *Endicott*, he certainly had to wait longer than the plaintiff in *Campbell*. Therefore, the Court concluded that plaintiff has provided evidence on the sixth element of a liberty interest claim. Accordingly, CCSD's motion for summary judgment on Plaintiff's liberty interest claim is DENIED.

B. PURVIS

Defendant Purvis also contends that he never made a false statement concerning Plaintiff. Purvis admits that his recommendation to relieve Brewer of his coaching responsibilities was base on the PPC investigative report, the CCSD Internal Task Force Report, and the GHSA's ruling. Plaintiff, however, has not directed the Court to any specific false statements made by Purvis. Rather, Plaintiff appears to contend that Purvis' recommendation in and of itself stigmatized him. The mere act of recommending Plaintiff's dismissal does not implicate

Plaintiff's liberty interests. *See Lagos v Modesto City Schools Dist.*, 843 F.2d 347 (9th Cir. 1988) (plaintiff not stigmatized by school board's decision not to renew his teaching contract). Consequently, the Court concludes that Plaintiff has failed to establish that defendant Purvis made a false statement. Consequently, the Court concluded that Plaintiff has failed to establish that Defendant Purvis made a false statement. Consequently, Purvis' motion for summary judgment on this issue is GRANTED.

C. GHSA and FORDHAM

Plaintiff also claims that the decision rendered by Fordham implicated his liberty interest in his reputation. The Court concludes, however, that plaintiff has not established that the statements in the ruling were made in the context of a termination. In *Campbell*, the transcript from the Commissioner's meeting at which she was dismissed was published. In contrast, the GHSA's ruling was issued months

before Plaintiff was removed from his coaching position. Consequently, the ruling did not implicate Plaintiff's liberty interest in his reputation. Accordingly, defendants GHSA's and Fordham's motion for summary judgment on Plaintiff's liberty interest claim is GRANTED.

STATE LAW CLAIMS

Brewer claims that the Defendants libeled him in violation of O.C.G.A. § 51-5-1. "A libel is a false and malicious defamation of another expresses in print, writing, pictures, or signs, tending to injure the reputation of the person and exposing him to public hatred, contempt, or ridicule." O.C.G.A. § 51-5-1(a). in order to recover for a libelous statement the statement must be published. O.C.G.A. § 51-5-1(b).

I. CCSD

Plaintiff claims he was libeled presumably by CCSD's distribution of the PPC's Investigative Report at a public meeting of the School Board. Summary Judgment is appropriate since Plaintiff failed to respond to CCSD's

argument on this issue. *See Early v Champion Int'l Corp.*, 907 F.2d 1077 (11th Cir. 1990). (non-moving party bears the burden of coming forward with sufficient evidence on each element that must be proved).

Furthermore, the Court notes that the statute of limitation had passed when this action was filed. The applicable statute of limitation to Plaintiff's claim for damage to his reputation is one year. *Wiggins v Citizens & Southern Nat. Bank,* 173 Ga. App. 761, 328 S.E. 222 (1985); O.C.G.A. § 9-3-33. The evidence shows that the PPC's investigative report was distributed on February 1, 1990. Brewer's complaint was filed February 7, 1991, which is outside the statute of limitations. Consequently, his claim is time barred. Accordingly, CCSD's motion for summary judgment on the issue of Libel is GRANTED.

II. Purvis

Plaintiff fails to identify how Dr. Purvis libeled or slandered him. The Court assumes that

Plaintiff's contention is that Purvis' action in recommending that Plaintiff be terminated defamed the Plaintiff. Plaintiff has not pointed this Court to any authority which would support his argument. Consequently, summary judgment in favor of Dr. Purvis is GRANTED. *See Celotex v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

III. GHSA

Plaintiff's allegation of defamation in the GHSA's ruling is based on the inclusion of language regarding Plaintiff's knowledge of the grade changes. In order to recover for a libelous statement the statement must be published. O.C.G.A.§ 51-5-1(b). Generally, publication occurs when the libel is communicated to anyone other than the person libeled. *Kurtz v Williams*, 188 Ga. App. 14, ___, 371 S.E.2d 878, 880 (1988); O.C.G.A. § 51-5-3. Georgia Courts, however, have carved an exception to the general rule, which provides that "when communication is intracorporate, or

between members of unincorporated groups or associations, and is heard by one who, because of his/her duty or authority has reason to receive the information, there is no publication of the allegedly slanderous material."Id.

As Executive Director of the GHSA, Mr. Fordham, had an obligation to communicate his findings to Superintendent Purvis. Even if the decision eventually was made public by others, there is no evidence that the GHSA or Fordham disseminated the ruling to anyone else. Consequently there was no publication.

Furthermore, even if there was publication, the statute of limitation on this particular instance of publication has expired. The evidence shows that the ruling was transmitted to Dr. Purvis on November 10, 1989. This action was filed on February 7, 1991, which is outside the one year limit. *See Wiggins,* 173 Ga. App. 761, 328 S.E.2d 222 (1985); O.C.G.A. § 9-3-33. Plaintiff, however, contends that Fordham's interview with Don Farmer kept the statutory

period for defamation open until September 1991. The Court disagrees.

The statute of limitation runs from the date of publication. Each publication of a libelous matter constitutes a separate cause of action. *Western Union Tel. Co. v Vickers,* 71 Ga. App. 204, ___, 30 S.E.2d 440, 443 (1944). This, the interview with Don Farmer, is a separate incident giving rise to a separate claim for defamation. Accordingly, Defendant's motion for summary judgment on Plaintiff's claim for defamation related to the GHSA ruling is GRANTED.

IV. FORDHAM

Plaintiff claims William Fordham's statements to Don Farmer were defamatory under O.C.G.A. § 51-5-1. Defendant Fordham contends that he was merely stating an opinion and opinions are not actionable. Defendant relies on *S & W Seafoods Co. v Jacor Broadcasting of Atlanta,* 194 Ga App 233, 390 S.E.2d 228 (1989), to support his contention. *S & W Seafoods,*

however, relied on dictum from *Gertz v Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed. 2d 789 (1974), in reaching its conclusion. In *Milkovich v Loraine Journal Co.*, 497 U.S. 1, ___, 110 S.Ct. 2695, 2705, 111 L.Ed.2d 1 (1990), the Supreme Court stated that *Gertz* did not create a "wholesale defamation exemption for anything that might be labelled opinion" and held that some opinions were actionable. Thus, some opinions are actionable under the law of defamation. The question is whether the opinion stated by Mr. Fordham is actionable.

In *Milkovich* the Court set forth a two pronged test to determine whether or not an opinion was entitled to protection. First, this Court must determine whether a reasonable fact finder could conclude that a statement implied a defamatory assertion. 110 S.Ct. at 2707. If the answer is "yes", then the district court must determine whether the defamatory assertion is factual enough to be proved true or false. *Id.* If is cannot be proved true or false then

the opinion is constitutionally protected. The Court concludes that the test has been met. Consequently, Fordham's motion for summary judgment on these statements is DENIED.

CONCLUSION

Accordingly, for these reasons stated above, defendant CCSD's motion is **GRANTED IN PART** and **DENIED IN PART.** Defendant Purvis's motion is **GRANTED.** Defendant GHSA's and William Fordham's motion is **GRANTED IN PART** and **DENIED IN PART.** Plaintiff's claim against the PPC, and Schacht and Good in their official capacities is **REMANDED** to the Superior Court of Clarke County. The Court reserves its ruling on claims against Good and Schacht in their individual capacities.

SO ORDERED, this 9th day of March, 1993.

S/
Duross Fitzpatrick, Judge
United State District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

KEN BREWER,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	CIV. NO.91-39-ATH(DF)
	:	
CAROL PURVIS, CLARKE CO. SCHOOL DISTRICT, WILLIAM C. FORDHAM, GEORGIA HIGH SCHOOL ASSOCIATION, HANS J. SCHACHT, CHRIS GOOD, THE PROFESSIONAL PRACTICES COMMISSION,	:	
	:	
Defendants.	:	

ORDER

Defendants Hans C. Schacht's and Chris Good's motion for summary judgment is presently pending before this Court. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.R. 56(c). For purposes of a summary judgment motion, the non-movant's version of the facts must be accepted and all disputed matters must be

resolved in favor of the non-movant. *Bishop v Wood,* 426 U.S. 341, 96 SD.Ct. 2074, 48 L.Ed.2d 684 (1976). Summary judgment, however is mandated, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial. *Celotex v. Catrett,* 477 U.S. 317, 106 S.Ct. 2538, 91 L. Ed.2d 265 (1986).

BACKGROUND

The background of this case is fully stated in *Brewer v Purvis,* 816 F.Supp. 1560 (M.D. Ga. 1560). The Court reiterates the following pertinent background. In the early fall of 1989, GHSA was notified by the State Department of Education of a possible violation of eligibility rules by Cedar Shoals High School ("CSHS"), i.e., that the grades of a Cedar Shoals student athlete, J.C., had been changed to make the student eligible for football competition.[1] On

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[1] Nancy Congor, who is in charge of special education referrals at CSHS,

November 1, 1989, Chris Good, an investigator for the Professional Practices Commission ("PPC")[2], received a telephone call from Mr. Randall Ponder, who was the administrator in charge of no pass/no participate at the Georgia Department of Education. Mr. Ponder informed Mr. Good that he had received a report of violations of the No Pass/No Participate rule at CSHS and that he and Regional Director Jim Gurley were going to Cedar Shoals on November 7, 1989, to begin an investigation. Mr. Ponder then asked Mr. Good to accompany them.

On November 7, 1989, Good, Gurley and

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testified that she made an anonymous phone call at the end of October 1989. PPC hearing at 634, 646.

[2] The PPC is an agency of the State of Georgia authorized to investigate alleged violations of rules, regulations, or policies of the state board, the commission or a local board by an educator. O.C.G.A. § 20-2-796 (a)(1)-(4).

Ponder visited CSHS.[3] While visiting CSHS, Chris Good spoke with Plaintiff for approximately five minutes.[4] On the same day, Gurley and Ponder visited Dr. Carroll Purvis and informed them of their investigation.[5] The next day Dr. Purvis met with Mr. Doug McLaughlin, the principal of CSHS, regarding the grade changing incident.

On November 8, 1989, Mr. Fordham called Mr. Good to inform him that GHSA would hold a hearing on Nov. 9, 1989 on the allegations of GHSA's regulations by CSHS. Mr. Fordham granted Mr. Good's request to attend as an observer for informational purposes. Although the PPC did not receive a written request to conduct an investigation into the grade changing incident

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[3] PPC hearing, Testimony Chris Good, p. 694.

[4] Id. at 698.

[5] PPC hearing, Testimony Carol Purvis, p. 136.

until Nov. 13, 1989[6], it instigated an official investigation on Nov. 9, 1989[7], which involved one or more interviews with approximately twenty-five people.[8]

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[6] PPC Hearing, Respondent's Exh. No. 6. The letter from Dr. Hall Rogers, Associate State Superintendent, though dated Nov. 8, 1989, is stamped "Received November 13, 1989." Chris Good testified that Mr. Ponder told him when they left CSHS on November 7, that he would receive a referral the next day. Id. at 855.

[7] Chris Good testified that he was conducting a "preliminary" investigation on behalf of the PPC at the invitation of the State Board of Education when he visited CSHS on November 7, 1989. PPC hearing at 852.

[8] Stroud Affidavit, Exh. "E". The first day "official" interviews were conducted at CSHS was Nov. 13, 1989.

On November 9, 1989, Coach Brewer observed Chris Good talking with Mr. Alan Connell, attorney for the GHSA, and William C. Fordham before the GHSA hearing began.[9] During the hearing Coach Brewer testified that he had no interest or knowledge of any grade changes involving J.C. Mr. Connell turned and asked Mr. Good if Coach Brewer had indicated the same in earlier interviews. Mr. Good replied that Coach Brewer told him that Coach Osborne had approached him and said "Here's the deal. I've talked to all the teachers. I think they understand. It wouldn't hurt for you to talk to them."

On November 14, 1989, Mr. Hans J. Schacht, Executive Director of the PPC, and Mr. Good visited Dr. Purvis to inform him of the PPC investigation. During the meeting, Schacht advised Dr. Purvis that it would be "improper for Purvis or the Clarke County Board of

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[9] Affidavit of Ken Brewer, dated Aug. 14, 1992. P. 12.

Education to investigate the grade changing situation" since the board had a "legal arm of the state who was doing the investigating" and that any local investigation should be put on hold.[10]

On January 23, 1990, Mr. Schacht advised Dr. Purvis of the PPC Executive Committee's finding that probable cause existed to believe that Plaintiff had committed an act or acts warranting the suspension of his teaching certificate. On January 24, 1990, Dr. Purvis telephoned Chris Good and asked for clarification concerning the PPC Executive Committee's findings and recommendations.

On February 1, 1990, Mr. Schacht presented the PPC's investigative report to the CCSD in an open meeting attended by the media.[11] In the report Mr. Good recommended that Coach Brewer's teaching certificate be suspended for two years.

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[10] Purvis deposition, dated Jan. 17, 1991, pp. 26-27.

[11] Purvis Affidavit at P. 11.

Schacht also instructed the Board to "use the report for study, deliberation, and to make decisions about employees and their contract tenure that are ethically and legally defensible."[12] Schacht was quoted in the local newspaper as telling the school board and public that the reason he gave the local school system the report was because they might not be able to enforce its no pass/no play policy since it was invalid.[13]

DISCUSSION

Plaintiff alleges that Good's and Schacht's actions deprived him of his property interest in

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[12] Exh. D to Plaintiff's Opposition to PPC's motion for summary judgment.

[13] In *Kitchens v State*, 198 Ga App. 284, 401 S.E.2d 552 (1991), the Georgia Court of Appeals held that state school policy, including the no pass/no play rule was invalid because it had not been promulgated by the Administrative Procedure Act.

his teaching and coaching positions without due process of law and his liberty interest in his reputation without due process of law. Defendants contend they are entitled to qualified immunity.

In its previous order, this Court held that Brewer had not been deprived of his property interests[14] without due process of law in his teaching position and that he did not have a property interest in his coaching position. Thus, the only issue is whether the Defendant's actions deprived Plaintiff of his liberty interest in his reputation.

The Eleventh Circuit employs a two part analysis in applying the objective

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[14] The only other potential property interest that the Plaintiff has is his teaching certificate. that interest, however, is the subject of Plaintiff's claims against the PPC and Good and Schacht in their official capacities, which were remanded to the state court.

reasonableness test for qualified immunity:

> *first*, the defendant public official must prove that 'he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred, *second*, the plaintiff must show a lack of good faith on the defendant's part. Lack of faith may be proved by showing that the public officials actions violated clearly established constitutional laws.

Williams v City of Albany, 936 F.2d 1256, 1259 (11th Cir. 1991) (per curium) (citations omitted). Thus, defendants must first show that they were acting within the scope of their discretionary authority as officials of the PPC when the alleged actions occurred.

"[A] government official can prove he acted within the scope of his discretionary authority by showing 'objective circumstance which would compel the conclusion that his actions were undertaken pursuant to the performance of his duties and within the scope of his authority."

Rich v Dollar, 841 F.2d 1558, 1564 (11th Cir. 1988) (*quoting Barker v. Norman*, 651 F. 1107, 1121 (5th Cir. 1981)). The PPC is authorized to investigate alleged violations of its code of ethics by certified school personnel for the purpose of making recommendations to the State Board of Education, the local board, the Professional Standards Commission or any combination thereof, which may accept or reject such recommendations. O.C.G.A. § 20-20796(2). While the PPC cannot initiate its own investigation, it may conduct an investigation at the request of a local board, the state board, the Professional Standards Commission or a state resident. O.C.G.A. § 20-20-796(b). Finally, once an investigation is finished the PPC may provide its findings of fact or recommendations to the local board, the state board or the Professional Standards Commission. O.C.G.A. § 20-2-797(a). Thus an investigator for the PPC, defendant Good was acting within his lawful authority when he visited Cedar Shoals

High School on November 7, 1989, at Ponder's request and when he attended the GHSA hearing for informational purposes.[15] Additionally, Defendant Schacht was acting within his authority when he presented the report to the Clarke County School Board.[16] Consequently, the burden of production shifts to the Plaintiff to establish that the defendants violated clearly established constitutional rights as a matter of law.

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[15] Although the written request from the state board is stamped as received on November 13, 1989 and even though the "official" request was not made until after November 7, the statute does not require a written request from the parties listed in O.C.G.A. § 20-20-796(b) to initiate an investigation.

[16] Plaintiff appears to concede the first prong of the test since his supplemental brief focuses on the violation of a clearly established right.

Plaintiff contends that Good violated O.C.G.A. § 20-2-796(c), which requires the PPC to provide a local board with written notice specifying the names of the parties making the complaint, the teachers to be investigated and explanation of the complaint against the subject under investigation and O.C.G.A. § 20-2-797(a). he further asserts that Schacht also violated O.C.G.A. § 20-2-797 (a). "'[N]either federal not state officials lose their [qualified] immunity by violating the clear command - of federal or state law - unless that state statute or regulation provides the basis for the cause of action sued upon.'" *Childress v. Small Business Administration.*, 825 F.2d 1550, 1553 (11th Cir. 1987) (*quoting Davis v Scherer*, 468 U.S. 183, 194 n. 12, 104 S.Ct. 3012, 3019, 82 L.Ed.2d 139 (1984). The violation of these statutes does not provide the basis for the cause of action sued upon. Thus, Good's failure to notify the CCSD of his investigation, his testimony at the GHSA hearing and Schacht's presentation of the report

do not establish that they violated clearly established constitutional rights. Nonetheless, they may still be held liable if their conduct violated minimum constitutional requirements of due process.

As a result of the GHSA hearing. Cedar Shoals was required to forfeit any games won during the 1989-90 school year in which the eligible student had played, pay a $1,000 fine and be on one year of probation. As state in this Court's previous order, Plaintiff did not have a property interest in the games CSHS won. Moreover, Plaintiff was not terminated at the hearing so his liberty interest was not implicated. The Eleventh Circuit standard for determining whether the deprivation of a liberty interest has occurred requires the plaintiff to prove: (1) a false statement (2) of a stigmatizing nature (3) attending a governmental employees discharge (4) made public (5) by the governmental employer (6) without a meaningful opportunity for employee name clearing. *Buxton*

v Plant City, 871 F.2d 1037, 1042 (11th Cir. 1989). Even if, however, plaintiff had a liberty interest or property interest at stake, he has been unable to show that Good's limited involvement in the GHSA hearing violated minimum standards of due process.

Plaintiff also contends that Good did not notify CCSB before he began his [investigation] [sic] November 7, 1989. The Court is unaware of any case,and plaintiff has not provided any case, which holds that the failure to notify the school board that one of its teachers is being investigated violates the teacher's due process rights. Additionally, even if it did, plaintiff cannot establish that the failure to do so implicated his liberty interest in his reputation. *See Buxton*, at 1042. Consequently, the Court concluded that Good is entitled to qualified immunity.

Finally, plaintiff contends that Schacht's furnishing of the investigative report to the

CCSB before the investigation was complete[17] violated O.C.G.A. § 20-2-797(a) as did his direction that the school board take action against the Plaintiff. Plaintiff cannot establish that Schacht's actions deprived him of due process in his liberty interest because Schacht was not his employer. *See Id.* Consequently, the court concluded that defendant Schacht is entitled to qualified immunity.

CONCLUSION

Accordingly, for the reasons stated above, Defendant Schacht's and Defendant Good's motion for Summary Judgment is GRANTED.

SO ORDERED, this 15th day of 1993.

S/
Duross Fitzpatrick, Judge
United States District Court

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[17] Plaintiff contends the investigation was not complete because the PPC had not conducted a hearing on the alleged violations when the report was provided.